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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND

In 1825 & 1826.

BY THOMAS HARRIS,
Clerk of the Court of Appeals,
and
REVERDY JOHNSON,
Attorney at Law.

VOLUME VII.

ANNAPOLIS:
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1827.

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ERRATA.

PAGE. LINE.
12—— 3 After *attested* insert *short.*
21——20 For *has* read *have.*
24 ——34 For *accrue* read *accrues.*
43——20 After *her* insert *in her.*
45——25 After *W. W. C.* insert the crotchet.
65——28 After "*very well*" insert *signed by the register of wills, &c.*
68——23 For *change* read *charge.*
70——17 For 1795 read 1794.
114—— 4 After *was* insert *not.*
—— 19 For *avowant* read *plaintiff.*
—— 28 For *devise* read *demise.*
161——41 For *in* read *on.*
172——19 For *mortgage* read *mortgagee.*
185——28 After *and* insert *endorsed by the said Thomas, and.*
222——18 After *estate* strike out the comma.
236——15 After *one* insert *years.*
—— 16 For *in* read *on.*
237——31 For *leaving* read *living.*
247—— 6 For *views* read *view.*
272——22 For *unavoidable* read *unavailable.*
301——12 For 1815 read 1814.
324—— 9 After *upon* insert *one of.*
331——28 *For lands* read *bonds.*
333——32 After *and* insert *not.*
339——16 For *power* read *form.*
345——40 For *bond* read *land.*
375——20 For *plaintiff* read *said John G.*
381——29 For *discharge* read *exchange.*
418——10 For *sole agent* read *sub-agent.*

VOL. VI. (omitted,)

28—— 1 For *prejudices* read *perjuries.*
443—— 3 For *intention* read *indication.*
580—— In the *Index,* tit. *inadequacy of price* 1, line 7, for *intention* read *indication.*

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. John Buchanan, Chief Judge.
Hon. Richard Tilghman Earle, Judge.
Hon. William Bond Martin, do.
Hon. John Stephen, do.
Hon. Stevenson Archer, do.
Hon. Thomas Beale Dorsey, do.

OF THE COURT OF CHANCERY.

Hon. Theodorick Bland, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's*, *Charles* and *Prince-George's* Counties.

Hon. John Stephen, Chief Judge.
Hon. Edmund Key, Associate Judge.
Hon. John Rousby Plater, do.

SECOND JUDICIAL DISTRICT—*Cecil*, *Kent*, *Queen-Anne's* and *Talbot* Counties.

Hon. Richard Tilghman Earle, Chief Judge.
Hon. Lemuel Purnell, Associate Judge.
Hon. Robert Wright, do.

THIRD JUDICIAL DISTRICT—*Calvert*, *Anne-Arundel* and *Montgomery* Counties.

Hon. Thomas Beale Dorsey, Chief Judge.
Hon. Charles J. Kilgour, Associate Judge.
Hon. Thomas H. Wilkinson, do.

FOURTH JUDICIAL DISTRICT—*Caroline*, *Dorchester*, *Somerset* and *Worcester* Counties.

Hon. William Bond Martin, Chief Judge.
Hon. James B. Robins, Associate Judge.
Hon. William Whittington, do.

FIFTH JUDICIAL DISTRICT—*Frederick*, *Washington* and *Allegany* Counties.

Hon. John Buchanan, Chief Judge.
Hon. Abraham Shriver, Associate Judge.
Hon. Thomas Buchanan, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.

Hon. Stevenson Archer, Chief Judge.
Hon. Charles W. Hanson, Associate Judge.
Hon. William H. Ward, do.

OF BALTIMORE CITY COURT.

Hon. Nicholas Brice, Chief Judge.
Hon. William M'Mechen, Associate Judge.
Hon. Alexander Nisbet, do.

ATTORNEY GENERAL.

Thomas Kell, Esquire.

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[illegible]

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

COURT OF APPEALS, JUNE TERM, 1825.

BEVANS *vs.* TAYLOR, *et al.* Lessee.

A declaration in ejectment contained two counts, one on a demise by A, and the other on a demise by B—*Held*, that the plaintiff may recover on the count whereby the land was demised by B, although he could not recover on the other count.

R T, having two sons A and O, and several other children, died in 1768, having by his will devised a tract of land to his youngest son O for life. A died in 1785, leaving two sons, T and J. T in 1790 married K, by whom he had before had an illegitimate son called F, the lessor of the plaintiff in the *second* count in the declaration, and who, after his marriage, he acknowledged to be his child, and had also other children after said marriage, the other lessors of the plaintiff in the *first* count in the declaration, and died in 1803. O, the tenant for life, died in 1817 intestate, leaving children now living—*Held*, that the plaintiff was entitled to recover on the demise of F in the second count of the declaration.

APPEAL from *Worcester* County Court. Ejectment for part of a tract of land called *Temple Comb.* The declaration contained two counts; the *first* on demises by *Teackle Taylor*, *Alexander Taylor*, *Nancy Taylor*, *James Buby*, and *Peggy* his wife, and *James Taylor*, and the *second* on a demise by *Teackle Taylor*. Defence was taken on warrant, and plots were returned. *Non cul* and issue joined. At the trial the plaintiff, (now appellee,) offered in evidence a patent for the land mentioned in the declaration, called *Temple Comb*, granted to *John Capman*, on the 10th of September 1684. He then offered in evidence that *Roger Taylor*, in the year 1767, was in possession of the said land; and that being so in possession, by his will, dated the 17th of November 1767, he devised it to his son *Obed Taylor* for life; and in 1768 died in possession, leaving *Alexander Taylor*, his eldest son, and several other children, mentioned in his said will. That *Alexander* died intestate in 1785, leaving *Teackle Taylor* his eldest son, and *Joshua Taylor* a younger son. That *Teackle* in 1790 married *Keziah Mallitt*, by whom he had had, before the passage of the act of 1786, *ch.* 45, an illegitimate son called *Teackle*, the lessor of the plaintiff mentioned in the *second* count in the declaration; that after his marriage he acknowledged the said son to be his child, and that subsequent to the marriage he had other children, viz. *Alexander*, and the other lessors of the plaintiff, mentioned in the *first* count in the declaration, and died in 1803, leaving the said children. That *Obed Taylor*, the devisee mentioned in the said will, died in 1817 intestate, leaving three or four children now living. The plaintiff then prayed the court to direct the jury, that the lessor of the plaintiff, mentioned in the *second* count of the declaration, was entitled to recover the land therein mentioned, and that they ought to find for the plaintiff upon that count. This direction the Court, [*Martin*, Ch. J. and *Robins*, A. J.] gave to the jury. The defendant excepted. Verdict for the defendant on the *first* count, and for the plaintiff on the *second*. Judgment upon the verdict. The defendant appealed to this court.

The cause was argued at the last June term before BUCHANAN, EARLE, and STEPHEN, J. by

J. Bayly, for the Appellant; and by
Spence, for the Appellee.

Curia adv. vult.

At this term,

JUDGMENT AFFIRMED. (*a*)

(*a*) Where A, seized in fee simple of land, devised it for life, and dies, leaving B his heir at law, who dies before the termination of the estate for life, the *heirs* of B are not, as such, entitled to the land, after the death of the tenant for life; for B had not such a seizin as to create a new stock of descent.

A person claiming land by descent, must entitle himself as heir of him who was last actually seized in fee. *Jackson vs. Hilton*, 16 *Johns, Rep*. 96. See *Jackson vs. Hendericks*, 3 *Johns. Cas*. 214; and *Bates vs. Shraeder*, 13 *Johns. Rep*. 200.

AYRES VS. TOLAND.—June, 1825.

An action may be maintained by the plaintiff in his own right, on a bond executed *to him as administrator* of a person deceased.

APPEAL from *Harford County Court.* The plaintiff below (now appellant,) brought an action of debt in his own right against the defendant, (the appellee,) upon a single bill, dated the 15th of May 1821, executed by the defendant and *Martha Daley,* whereby, six months after date, they jointly and severally promised to pay to the plaintiff, *administrator of Thomas Daley, deceased,* $56 56, with interest, &c. The defendant demurred to the declaration, and the plaintiff joined in demurrer. The County Court, [*Ward,* A. J.] ruled the demurrer good, and rendered judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN, and DORSEY, J.

Speed, for the Appellant, contended—1. That an executor or administrator may sue in his own name for a debt arising due after the death of the testator or intestate. 2. That the words "*administrator of Thomas Daley, deceased,*" used in the single bill, were but *descriptio personæ,* and did not affect the remedy upon it. He referred to 2 *Selw. N. P.* 703. *Hosier vs. Ld. Arundell,*, 3 *Bos. & Pull.* 11. *Shipman vs Thompson, Willes Rep.* 104. (and *notes.*)

Mitchell, for the Appellee, cited *Betts vs Mitchell,* 10 *Mod.* 315. *King vs. Thom,* 1 *T. R.* 487. *Ord vs. Fenwick,* 3 *East,* 110. *Henshall vs. Roberts,* 5 *East,* 150. *Hosier vs. Ld. Arundell,* 3 *Bos. & Pull.* 7; and the act of 1820, *ch.* 174, *s.* 3.

JUDGMENT REVERSED,
and judgment rendered for the appellant for the debt and costs.

◆

DIFFENDERFFER *vs.* HUGHES.—June, 1825.

An appellant may dismiss his appeal at any time.

APPEAL from *Baltimore* County Court. In this case the appellant at the last term *dismissed* the appeal.

Mitchell, for the Appellee, moved the court, at the present term, for an order to strike out the dismissal, and to enter the judgment of the court below affirmed, so as to enable the appellee to take out execution from this court for the debt and costs.

THE COURT. The appellant may at any time dismiss his appeal.

MOTION OVERRULED.

◆

HARDEN & CARSON *vs.* MOORES, Garn. of PRESBURY.—Dec. 1825.

An attachment on judgment cannot be issued from one county court to another county court.

The proceeding by attachment is not considered as embraced by the general term *execution*, as used in the acts of October 1777, *ch.* 12, and 1794, *ch.* 54.

If a defendant shall fly, remove, or absent himself out of the county in which a judgment is rendered against him, the court of the county, in which he may happen to be, may, upon the production of a transcript of such judgment, award an execution by *ca. sa. fi. fa.* or *attachment*.

If a defendant shall *remove* from the county in which a judgment is rendered against him, an *execution* may issue from the court of such county, to the sheriff of the county in which the defendant shall *reside*, &c.

Upon the return of a *nulla bona* on a *fieri facias*, issued in the county in which a judgment has been rendered, the clerk of the court of that county may issue a *fieri facias* against the goods, &c. of the defendant, in any other county, &c.

Executions, thus issued, may be renewed out of the county court to which they shall be returned.

APPEAL from *Harford* County Court. This was a writ of attachment on judgment, issued out of *Harford* county court on the 16th of December 1822, and directed to the sheriff of that county, reciting the recovery of a judgment in *Baltimore* county court on the fourth Monday in March 1820, by *Samuel Harden* and *Nehemiah Carson*, (the now appellants,) against *George G. Presbury* 3d, for $300 current money damages, and $7 27½ costs; that on the 10th of May 1822 a writ of *fieri facias*, directed to the sheriff of *Harford* county, issued out of *Baltimore* county court on the said judgment, against the said *Presbury*, returnable to *Harford* county court on the —— Monday in August then next; that on the fourth Monday of August 1822, being the return day of the said writ, the said

Harden and *Carson* produced before *Harford* county court a short copy of the judgment aforesaid, attested and certified by *William Gibson*, esquire, the clerk of *Baltimore* county court aforesaid, under his hand, and the seal of *Baltimore* county court aforesaid, before which latter court the judgment aforesaid was had and obtained; that on the said fourth Monday of August 1822, the sheriff of *Harford* county returned the said writ of *fieri facias*, endorsed *nulla bona*. The sheriff was therefore commanded to attach any of the lands, tenements, goods, chattels and credits, of the said *Presbury*, &c. (in the usual form of writs of attachments on judgments,) and make return thereof to *Harford* county court on the second Monday of March then next. At the return day, (March 1823,) the sheriff certified that he had "attached credits in the hands of *Parker Moores*, to the amount of $1700, in the presence of *Hambleton Morgan* and *Thomas S. Bond.*" The garnishee appeared and imparled, (*Presbury* being called made default.) At the next term, (August 1823,) the plaintiffs exhibited interrogatories to be answered by the garnishee, and on motion of the plaintiffs it was ruled by the court that he should answer them by the next term, to which time the garnishee again imparled. At the next term, (March 1824,) the garnishee answered the interrogatories on oath, and then moved the court to quash the writ of attachment; which the court did, with costs to the garnishee, and the plaintiffs appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN and DORSEY, J.

Mitchell, for the Appellants, contended, that the judgment of the court below was erroneous—1. Because the transmission of the short copy of the judgment, under the act of assembly, put the county court of *Harford* as fully in possession of the cause as if the judgment had been originally rendered there. 2. Because the proceedings were regular on the face of them, and that a motion to quash the writ was not the proper mode of taking the benefit of any defect, if any existed; but that the same should have been done by plea or demurrer. 3. Because whatever defects might exist in the original proceedings against

Presbury, the garnishee could not avail himself of them by way of defence to the attachment, that being in the nature of an execution. To show that the proceedings were regular, he referred to the acts of October 1777, *ch.* 12; 1794, *ch.* 54; 1795, *ch.* 23; and 1715, *ch.* 40, *s.* 7. If the *fieri facias* issued irregularly in not setting forth the issuing of the first *fieri facias*, it could only be set aside by *Baltimore* county court, and then only at the instance of the party affected by it. *Jackson vs. Bartlett*, 8 *Johns Rep.* 361. The garnishee should have pleaded the fact, as it could not be decided on motion to quash the writ. 1 *Com. Dig.* tit. *Bail*, (R 3) 704. *Cholmondely vs. Bealing*, 2 *Ld. Raym.* 1096. *Ball vs. Russell*, *Ibid* 1177. 5 *Com. Dig.* tit. *Pleader*, (3 L 14,) 783. The motion should have been made at the return day of the writ, and by imparling it was waived by the garnishee. 1 *Tidd's Pr.* 90, 91, 165, 190, 435. 4 *Com. Dig.* tit. *Execution*, (G) (H) 136, 137.

Maulsby, *Gill* and *Speed*, for the Appellee. By the act of 1715, *ch.* 40, *s.* 7, an attachment on judgment may be issued to the sheriff of the county wherein the judgment was rendered. If the defendant shall *remove* or *absent* himself out of the county, then, upon a *transcript* of the judgment under seal, an attachment may be issued thereon in any county where the defendant shall happen to be. 1715, *ch.* 41, *s.* 8. By the act of October 1777, *ch.* 12, *s.* 3, where the defendant has *removed* out of the county, an execution may be issued from the county court where the judgment was obtained, to the county where the defendant *shall reside;* and the plaintiff, to entitle himself to the benefit of the execution, shall produce a short copy of the judgment. Such execution may if necessary be renewed from time to time out of the court of the last mentioned county. 1795, *ch.* 23. The act of 1794, *ch.* 54, *s.* 9, authorises the issuing of a *fieri facias* to any other county than that in which the judgment was rendered, where a previous *fieri facias* has issued to the sheriff of the county where such judgment has been obtained, and is returned *nulla bona.* The plaintiff, to entitle himself to the benefit of such execution, must produce an attested short copy of the judgment. Such execution may, if necessary, be renewed from time to time out of the court of the last mentioned county. 1795, *ch.* 23. There is no act of assembly which justifies the proceeding in this case. Here the foundation for issuing the attachment out of *Harford* county court, is a *fieri facias* from *Baltimore* county court, on a judgment rendered in that court, with a short copy of the judgment, in which writ of *fieri facias* it is not stated that any former *fieri facias* had been issued, and was returned *nulla bona*, so as to justify the issuing the *fieri facias* to *Harford* county court. It is true the writ is endorsed "*fi. fa.* to *Harford* county, after 2d *fi. fa*;" but this will not be urged as evidence of the fact, that a previous *fieri facias* had been issued, and was returned *nulla bona.* The court cannot presume that a former *fieri facias* had issued, and was returned *nulla bona.* The *fieri facias* does not show it, and there is no proof of the fact. Nor is there any proof that the defendant had removed from *Baltimore* county, so as to entitle the plaintiffs to a *fieri facias* to *Harford* county. The acts of ministerial officers are not to be presumed to be according to law in the absence of all proof. Their acts are to be strictly construed, their authority being prescribed by law. To show that the process of the court recite all the facts, they referred to the forms in 2 *Harr. Ent.* 689, 629, 57, &c. To show that the attachment laws, and all laws delegating a special jurisdiction, must be strictly pursued, they referred to *Shivers vs. Wilson*, 5 *Harr. & Johns.* 133. *Wicks vs. Caulk, Ibid* 42. *Mandeville vs. Jarrett*, 6 *Harr. & Johns.* 497. The clerk of *Baltimore* county court had no authority to issue the *fieri facias* unless a *nulla bona* had been returned on a previous *fieri facias.* It having improperly issued, it is void. *Purl's Lessee vs. Duvall*, 5 *Harr. & Johns.* 77. The *fieri facias* is irregular and void on another account—it has no return day. *West vs. Hughes*, 1 *Harr. & Johns.* 6. *Read vs. Markle*, 3 *Johns. Rep.* 523. *Tidd's Pr.* 1000. 2 *Bac. Ab.* tit. *Execution*, (P) 739. 6 *Com. Dig.* tit. *Return of Process*, 96. *Baltimore* county court could not act upon the *fieri facias*, as it was not before them, having been made returnable to *Harford* county court. By the act of 1795, *ch.* 56, the garnishee may make the same defence which the original defendant could make. He can protect his own rights, and those of his creditor; and they are not to be regarded as strangers. 2 *Bac.*

Ab. tit. *Customs of London*, (H) 258. The *fieri facias* was issued on the 10th of May 1822, on a judgment stated to have been rendered in March 1820, and there is no continuance stated to shew that executions had issued from time to time so as to keep the judgment active. By the act of 1715, *ch.* 40, s. 7, the garnishee is called upon to show why condemnation should not pass. The motion to quash the attachment is the proper mode.

Mitchell, in reply. The *fieri facias* was made returnable in *August*, the time of the meeting of *Harford* county court, as fixed by the act of 1811, *ch.* 108, of which all persons are bound to have knowledge, it being a public law. This case does not fall within the decision in *West vs. Hughes.* The jurisdiction of magistrates is limited, but that is not the case with the county courts. The county courts may amend their process, which cannot be done by magistrates, and in this instance the process might have been amended. 1 *Sellon's Pr.* 520. *Baltimore* county court were not bound to insert in the *fieri facias*, that a former one had been issued and returned *nulla bona.* 1 *Sellon's Pr.* 535, (G) 518, (C) 537. Bail can only take advantage of a *ca. sa.* not having been returned *non est* against his principal, by pleading the fact, and cannot move on that account to quash the *scire facias* upon the ground that no such *ca. sa.* had been issued. In *Barney vs. Patterson's Lessee*, 6 *Harr. & Johns.* 204, an attachment issued a term after it was awarded, and although it was irregular, yet it was held not to be void. So in *Winingder vs. Diffenderffer*, 5 *Harr. & Johns.* 181. The irregularities in this case were merely clerical, which the court could amend. *Duvall vs. Wells*, 4 *Harr. & M'Hen.* 164. The court should not have quashed the writ, but ought to have amended it. If there had been a recital in this *fieri facias*, that a previous one had issued, and had been returned *nulla bona*, it would no more clothe *Harford* county court with jurisdiction, than if there was no such recital. The fact that such a *fieri facias* had not issued, and been so returned, should have been pleaded, that the plaintiffs might show, if such was the case, that they had issued a former *fieri facias*, and that it had been returned *nulla bona*.

Buchanan, Ch. J. delivered the opinion of the court. This is the case of an attachment, issued out of *Harford* county court, on a judgment obtained against *George G. Presbury*, in *Baltimore* county court, which, after interrogatories filed and answered by the garnishee, was quashed by the court, on motion.

The question to which we have directed our attention is, whether an attachment will lie in any and what case, from one county court, on a judgment rendered in another? And that depends on the construction of several acts of assembly, which will be very briefly considered. Under the act of 1715, *ch.* 40, *s.* 7, "the plaintiff in a judgment may, instead of any other execution, take out an attachment against the goods, chattels and credits, of the defendant in the judgment." But that act only authorises the suing out attachments on judgments, from the courts in which the judgments are rendered, and has no application to this case.

By the act of 1715, *ch.* 41, *s.* 8, if a defendant in a judgment shall fly, remove, or absent himself out of the county in which the judgment is rendered, the plaintiff may take a transcript of the record of the judgment, under seal, and lay it before the court of the county in which the defendant may happen to be, to be entered upon the records of such county, upon which, that court is authorised to award execution by *capias ad satisfaciendum*, *fieri facias* or *attachment.*

That act relates only to the case of a defendant who shall fly, remove, or absent himself from the county in which a judgment is rendered against him; and though, by that act, an attachment, by way of execution, will lie from one county court, on a judgment rendered in another, yet it is a proceeding authorised only in the court of the county in which the defendant may be, and on the production alone of a transcript of the record of such judgment, under the seal of the court in which it was obtained. Which certainly is not this case. It is not the case of an attachment awarded by *Harford* county court on the production of a transcript of the record of a judgment rendered in *Baltimore* county court against *Presbury*, who had fled, removed, or absented himself from *Baltimore* county, and was then in *Harford* county; but of an attachment, sued out of *Harford* county court, on a return to that court of *nulla bona*, by the sheriff of *Harford* county, on a writ of *fieri facias* issued out of *Baltimore* county court, and directed to him, upon a judgment rendered in *Baltimore* county court against *Presbury*, accompanied by the production of a short copy of the judgment. And to show that the attachment regularly issued, the acts of October 1777, *ch.* 12, *s.* 3; 1794, *ch.* 54, *s.* 9, and 1795, *ch.* 23, *s.* 1, have been referred to, by which it will be seen, on examination, do not authorise such a proceeding.

By the act of October 1777, *ch.* 12, *s.* 3, if a defendant in a judgment shall remove from the county in which the judgment is rendered, to any other county, an *execution* may issue from the court in which the judgment was rendered, to the sheriff of the county in which the defendant shall *reside*, returnable to the court of that county; and it is only made necessary for the plaintiff to produce a short copy of the judgment before the court, to which the execution is returnable, to entitle himself to the benefit of such execution. The act of 1715, *ch.* 41, it has been seen, relates to the case of an absconding debtor, and authorises an attachment to be awarded by the court of the county in which he may happen to be, on the production of a transcript of the record, and in no other case.

The act of October 1777, *ch.* 12, relates to the case of a removal by the defendant, for the purpose of residence; in which the execution is to be issued from the court in which the judgment was rendered, returnable to the court of the county in which the defendant may reside; with no authority to that court to issue any execution by attachment or otherwise, on the production of a short copy of the judgment; which was the only evidence that was produced in this case to the court of *Harford* county, of a judgment against *Presbury* in *Baltimore* county court. The *ninth section* of the act of 1794, *ch.* 54, gives to judgment creditors this further remedy, that upon the return of *nulla bona* on a *fieri facias*, issued in the county, in which a judgment has been obtained, the clerk of the court of that county is authorised to issue an *execution* against the *goods and chattels, lands and tenements*, of the defendant, in any other county, returnable to the court of the county in which *such goods and chattels, lands and tene-*

ments, may be and lie, without respect to the residence of the defendant. And by this act too, it is only made necessary for the plaintiff, to entitle himself to the benefit of such execution, to produce before the court, to which it shall be returnable, a short copy of the judgment. This act, no more than the act of October 1777, *ch.* 12, authorises the issuing an execution of any kind, out of any county court, on the production of a short copy of a judgment rendered in a different county. But like that act, does no more than give authority to the clerk of a county court, in which a judgment is rendered, to issue an *execution* on such judgment, returnable to the court of another county; with this difference only, that by the act of 1777, *ch.* 12, an execution so issued, is to be returned to the court of the county in which the defendant *shall reside,* and by the act of 1794, *ch.* 54, to the court of the county in which the *goods and chattels, lands and tenements, of the defendant, may be and lie.* An attachment is not an ordinary process, by which to arrive at the fruits of a judgment, and will only lie, when specially authorised; as by the act of 1715, *ch,* 40, *s.* 7, from the court in which the judgment was rendered, against the goods, chattels and credits, of the *absent* defendant; and by the act of 1715, *ch.* 41, *s.* 8, from the court of the county in which a defendant may happen to be, who has fled, removed, or absented himself from the county in which the judgment was rendered, upon the production of a transcript of the record. The proceeding by attachment, therefore, is not considered as embraced or intended by the general term *execution,* as used in the acts of October 1777, *ch.* 12, and 1794, *ch.* 54, which is only to be understood, according to its ordinary and familiar acceptation. And the act of 1795, *ch.* 23, s. 1, which has been mainly relied upon, authorises the same kind of execution only that is authorised by the acts of 1777, *ch.* 12, and 1794, *ch.* 54, and gives no original authority to the court of one county to issue an attachment in nature of an execution, or any other execution on a judgment rendered in another. But only authorises, when *executions* have been sent from one county to another, according to the provisions of the acts of 1777, *ch.* 12, and 1794, *ch.* 54, the same kind of *executions* to be *renewed* out of the county court, to which the preceding *executions* were returned, and to be proceeded upon, as if the judgments had been rendered in such courts—that is, the *renewed executions* to be so proceeded upon. The language of the act is: "that in all cases where any *execution* has been, or shall be sent, with an attested copy of the judgment whereon the same may have been issued from one county to another, according to the provisions of the act passed at October session 1777," &c. "and of the act passed at November session 1794," &c. "the same proceedings shall and may, upon the return of *such execution,* be had thereon in the county court of the county to which such *execution* has been, or shall be sent, as if the said *execution* had been *originally* issued by the said court on a judgment obtained therein; and the same *execution* may, if necessary, be *renewed* from time to time, in virtue of such attested short copy of the judgment, out of the county court to which such *original execution* shall have been returned, and be proceeded upon in like manner as if the judgment in such case had been rendered therein." The renewal here provided for, has reference to the original, and the terms *"the same execution may be renewed,"* can only mean, that another *execution* of the same kind may be issued, and not that a different kind of execution may be issued, which would not be a renewal of the former. And the original in this case from *Baltimore* county, being a *fieri facias,* it was a *fieri facias* only that was authorised to be issued from *Harford* county court, and not an attachment, which was not a renewal of the *original,* or in the language of the act, the *same execution*; but of an entirely different character, and only authorised by the act of 1715, *ch.* 41, *s.* 8, to be awarded, in the class of cases therein provided for, by a court, other than that in which the judgment is rendered, upon the production of a transcript of the record, and by no act, upon the production of a short copy of the judgment only. And as neither the act of October 1777, *ch.* 12, nor the act of 1794, *ch.* 54, authorises the issuing an attachment from one county to another, so neither does the act of 1795, *ch.* 23; but the whole office of that act is to secure to a plaintiff suing out an execution from one county to another, according to the provisions, either of the act of 1777, *ch.* 12, or of the act of 1794, *ch.* 54, the full benefit of such execution; and also to authorise the renewing, if necessary, such execution from the county court to which it may be returned. And it provides in no case for the issuing an attachment, in nature of an execution on a judgment, from the county court in which such judgment is rendered, to another county, but leaves the law upon that subject as it was before.

But even if an attachment was embraced by the general term *execution*, as used in the acts of October 1777, *ch.* 12, and 1794, *ch.* 54, yet no attachment having been sent from *Baltimore* county to *Harford* county, there was nothing to authorise the issuing an attachment from the county court of *Harford*; that court being clothed with no authority to issue an original execution of any kind in the case, but only to renew such as might be sent from *Baltimore* county, accompanied by a short copy of the judgment. And if, moreover, the act of 1795, *ch.* 23, could be understood by the terms, "*and the same execution may, if necessary, be renewed,*" as authorising the issuing any kind of execution, different from the original returned, still this case is not covered, which is not founded upon, and if it was, could not be sustained under the act of October 1777, *ch.* 12. It is not stated in the proceedings, nor does it in any manner appear, that *Presbury* was residing in *Harford* county, and that act authorises an execution, of no kind, to be issued from the county court in which a judgment is obtained, to any county, other than that in which the defendant shall reside; and any renewal, founded upon the return of an original execution that issued without authority, must be irregular—the act of 1795, *ch.* 23, only authorising renewals of executions sent from one county to another, by the court to which they are returned, where the original executions are sent "*according to the provisions of the acts*" of October 1777, *ch.* 12, and 1794, *ch.* 54. And if these proceedings are to be considered as founded upon the act of 1794, *ch.* 54, after a return of *nulla bona* to *Baltimore* county court, it will make no difference. That act, upon the return of *nulla bona*, on a *fieri facias*, in the county in which a judgment has been rendered, authorises the issuing an execution against the goods and chattels, lands and tenements only, of the defendant, lying and being in any other county, returnable to the court of the county in which such goods and chattels, lands and tenements, may be and lie; and authorises no execution by attachment, or otherwise, to be sent to a foreign county, against any thing else than the goods and chattels, lands and tenements, of the defendant. And there is nothing in the act of 1795, *ch.* 23, under any construction of it, that authorises the court of a county, to which an execution has been sent from another county, according to the provisions of the act of 1794, *ch.* 54, to issue any other execution than such as could have been sent from the county in which the judgment was obtained In this case a *fieri facias* was sent from *Baltimore* county, where the judgment was rendered, to *Harford* county, to affect such goods, &c. of the defendant, as might be there; and if an attachment could, under the act of 1794, have been sent, it could only have been against the goods and chattels, lands and tenements, of the defendant, and not against his credits. But upon the return to *Harford* county court of *nulla bona*, on the *fieri facias* sent from *Baltimore* county, and the production of a short copy of the judgment, an attachment, in nature of an execution, was sued out of that court, by way of renewal, against the lands, tenements, goods, chattels and *credits*, of the defendant; by virtue of which the *credits* alone of the defendant were attached in the hands of *Moores*, the garnishee, against which there was no authority for issuing an attachment from that court, if an attachment could have been issued at all. And having, in any view of the subject, as we think, improvidently issued, it was properly quashed on motion.

JUDGMENT AFFIRMED.

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Ruff's Adm'r. *D. B. N. vs.* Bull—December, 1825.

When the statute of limitations once begins to run, no subsequent circumstance stops its operation. It does not however begin to operate unless there is a person in *esse* competent to sue.

Appeal from *Harford* County Court. This was an action of debt, brought the 3d of March 1819, on a single bill, dated the 19th of January 1799, executed by the defendant, (now appellee,) in favour of *Hannah Ruff*, (since deceased,) for £66 10 8, and payable on demand. The question in the case grew out of the pleadings, and they are sufficiently stated by the judge who delivered the opinion of this court. The county court rendered judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, and Dorsey, J.

Maulsby, and *Speed*, for the Appellant, contended, 1. That the statute of limitations did not begin to run in this case until the children of the plaintiff's intestate, or one of them, attained full age. 2. That if the statute began to run, its operation was suspended by a want of parties capable of bringing suit. 3. That before the expiration of twelve years from the date of the single bill in suit, the administrator died, and the defendant was appointed and acted as guardian to the infant children, (in whom the interest had vested,) at a time when there was no administration, and that he should not be permitted to profit by his neglect to pay the debt, and fraudulently to shelter himself under the statute. They referred to *South Sea Company vs. Wymondsell*, 3 *P. Wms.* 143. *Bree vs. Holbeck*, 2 *Doug.* 656. *Reeves's Dom. Rel.* 327, 335, 336. *Cowper vs. Scott*, 3 *P Wms.* 119. *Cary vs. Bertie*, 2 *Vern.* 342. 4 *Bac. Ab.* tit. *Limitation of Actions*, (D 4) 476. *Faw vs. Roberdeau*, 3 *Cranch*, 174.

Mitchell, for the Appellee, cited 4 *Bac. Ab.* tit. *Limitation of Actions*, (E 4) 479. *Wilcocks vs. Huggins*, 2 *Stra.* 907. *Hickman vs. Walker*, *Willes*, 27; and *Peck vs. Randall's Trustees*, 1 *Johns. Rep.* 165.

Stephen, J. delivered the opinion of the court. This is an action of debt, instituted by *Richard H. Ruff*, administrator *de bonis non* of *Hannah Ruff*, against *William Bull*, on a single bill, bearing date on the 19th of January 1799, payable on demand. To which action the defendant has pleaded the statute of limitations, that the debt or thing in action had been above twelve years standing before the institution of the suit. To this plea the plaintiff replied, that it ought not to be sustained, because *Hannah Ruff*, the obligee, died the 10th of September 1801, leaving two children who were minors; and that letters of administration on the estate of *Hannah Ruff* were granted to

Henry Watters on the 30th of October 1801, and that on the 20th of July 1805, *Henry Watters* also departed this life. That on the 14th of November 1810, *William Bull*, the defendant, was appointed guardian to the minor children of *Hannah Ruff*, who were entitled to the whole of her personal estate, but that no administration *de bonis non* on her estate, after the death of *Henry Watters*, the first administrator, was granted until the 25th of August 1818, when letters were granted to *Richard Ruff*, the plaintiff in this suit; and that twelve whole years had not elapsed from the date of the bill, or the time it became due, prior to the commencement of this action, if the time is deducted during which there was no administration, from the whole time which has elapsed; and that the defendant ought not to avail himself of the time which elapsed during the time he was guardian to the infant children who were entitled to the money when recovered. To this replication there was a demurrer; and the question is, whether the demurrer is sustainable in point of law? The single bill, upon which the action is founded, bears date on the 19th of January 1799, and is payable on demand, and the obligee did not die before the 10th of September 1801. More than two years elapsed, after the cause of action accrued, before the death of the party to whom the writing obligatory was given, who might have enforced the payment of the money in her life-time if she had been disposed to do so. In a few weeks after her death, letters of administration were granted to *Henry Watters*, who did not die till 1805. During the period of his administration he also declined the issuing of legal process for the recovery of the claim, and no action was brought for that purpose until the present plaintiff was appointed administrator in the year 1818. It then appears, that a right of action existed for more than two years, which might have been enforced by *Hannah Ruff* in her life-time, and that her administrator had the power of compelling payment for a period of more than three years before he died. The principle of law is indisputable, that when the statute of limitations once begins to run, nothing will stop or impede its operation. It never does attach unless there be some person in being competent to sue, but when that is the case the legal bar to the recovery of the money will arise, unless legal steps are adopted to enforce payment within the period prescribed by law. In support of this principle, see 4 *Bacon's Abr.* 479. *Doe vs. Jones*, 4 *Term Rep.* 301. *Peck vs. Randall's Trustees*, 1 *Johns. Rep.* 165, where the general rule is laid down to be, that when the statute of limitations once begins to run, it continues to run, notwithstanding any subsequent disability.

JUDGMENT AFFIRMED.

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HASLETT'S Adm'r. *D. B. N. vs.* GLENN.—December, 1825.

An executor cannot make the property of his testator his own, by paying the debts of the testator out of his own funds to the amount of the appraisement of his estate.

An executor's having settled an account of his administration with the orphans court, and being charged by that court with the appraised value of the estate according to the inventory, is not conclusive evidence that he had fully administered the effects of the deceased, and that thereby they became his right.

The act of limitations is no bar in an action of trover, where the conversion of the property of a deceased person was before letters of administration were granted to the plaintiff, but at a time when there was no person to assert the rights of the creditors and legatees of the deceased. The statute begins to operate only from the time a right to demand the property vests in some one.

Where land had been purchased and conveyed in trust for a husband and his wife during their joint lives, and the life of the survivor of them, and the crops growing on the land at the death of the husband were sowed or planted by the vendor of the land before he conveyed, such crops, as emblements, survived to the wife under the trust deed, and made no part of the husband's personal estate. But if the land had been sowed or planted by the husband after his purchase, it had been otherwise.

APPEAL from *Baltimore* County Court. This was an action of *trover*, brought on the 12th of March 1822 by *James Smith*, administrator *de bonis non*, with the will annexed, of *William W. Haslett*, (now appellant,) against the appellee, (the defendant below.) *Not guilty*, and *actio non accrevit infra tres annos*, were pleaded. Issue was joined to the first plea, and the general replication and issue to the second. The facts of the case sufficiently appear in the statement of the judge, who delivered the opinion of this court.

The cause was argued at the last term before BUCHANAN, Ch. J. and EARLE, STEPHEN and DORSEY, J.

S. J. Donaldson and *Belt*, for the Appellant, contended, 1. That an executor cannot become the purchaser of the goods and chattels of his testator, nor by any other means whatever acquire a property therein other than as executor; and that if an executor had such power, there was no evidence in the cause to prove an exercise of that power by the executrix, *Ann Haslett*. 2. That where an executor dies possessed of goods and chattels, the property of his testator, and leaves them unadministered, they immediately, upon his death, vest in the administrator *D. B. N.* whensoever afterwards administration may be granted. 3. That the sale made by the appellee in this cause was an actual conversion, and that it was not incumbent upon the appellant to prove a demand and refusal. 4. That although the administrator *D. B. N.* is by relation possessed of property unadministered by the executor from the moment of the executor's death, yet that for any injury to the property done, between the time of his death and the grant of administration, the act of limitations begins to operate from the time of administration granted, and not from the time when the injury is done. 5. That upon the death of tenant for life all crops then growing become assets in the hands of his executor.

On the *first* point, they cited the act of 1798, *ch.* 101, *sub ch.* 8, *s.* 2, 3, 19; *sub ch.* 14, *s.* 9. *Toller*, 238. *Conway vs. Green*, 1 *Harr. & Johns.* 151. *Scott vs. Burch*, 6 *Harr. & Johns.* 67. *Hall vs. Griffith*, 2 *Harr. & Johns.* 483. The act of 1816, *ch.* 203. 3 *Blk. Com.* 18.

On the *second* point—1 *Com. Dig.* tit. *Administration*, (B 10) 341. 3 *Bac. Ab.* tit. *Executor & Administrator*, (H 1) 58. *Anon. Comb.* 304. *Anon. Ibid* 451. *Long vs. Hebb*, *Styles' Rep.* 341.

On the *third* point—6 *Bac. Ab.* tit. *Trover*, 677, 679. 1 *Chitty's Plead.* 78.

On the *fourth* point—*Sewell vs. Hepburn*, 4 *Harr. & Johns.* 393. *Hodsden vs. Harridge*, 2 *Saund.* 63, g. *(note.)* *Curry vs. Stephenson*, *Comb.* 311. S. C. 2 *Salk.* 421.. *Parker vs. Fassitt*, 1 *Harr. & Johns.* 339. 1 *Com. Dig.* tit. *Actions*, &c. (H 6) 221.

On the *fifth* point—1 *Cruise's Dig.* 87. The acts of 1798, *ch.* 101, *sub ch.* 6, *s.* 12, *sub ch.* 7; 1802, *ch.* 101, *s.* 2; and

3 *Bac. Ab.* tit. *Joint Tenants,* 675, 692. *Ibid* tit. *Executors,* &c. (H 3) 64. *Latham vs. Atwood, Cro. Car.* 515.

Glenn and *R. Johnson,* for the Appellee, on the *first* and *second* points cited 1 *Com. Dig.* tit. *Administration,* (B 10) 341. 3 *Bac. Ab.* tit. *Executor,* (H) 58. *Livingston vs. Newkirk,* 3 *Johns. Chan. Rep.* 318. The act of 1798, *ch.* 101, *sub ch.* 15, *s.* 1. *Toller,* 252. The act of 1798, *ch.* 101, *sub ch.* 8, *s.* 3, *sub ch.* 10, *s.* 1; *sub ch.* 14, *s.* 2. *Quick vs. Staines,* 1 *Bos. & Pull.* 293. *Farr vs. Newman,* 4 *T. R.* 625, *(note.)*

On the *third* point—6 *Bac. Ab.* tit. *Trover,* (C) 683.

On the *fourth* point—*Sewell vs. Hepburn,* 4 *Harr. & Johns.* 393. The act of 1715, *ch.* 23.

On the *fifth* point—the acts of 1798, *ch.* 101, *sub ch.* 7; 1802, *ch.* 101, *s.* 2; 1807, *ch.* 136, *s.* 1. 3 *Bac. Ab.* tit. *Executor,* 98. *Hambly vs. Trott,* 1 *Cowp.* 373. *Toller,* 365. 1 *Com. Dig.* tit. *Administration,* (C 3). 2 *Blk. Com.* 508.

Curia adv. vult.

At this term the opinion of the court was delivered by

EARLE, J. The following is a full statement of the facts of this case. On the 25th of April 1814, Doctor *William W. Haslett,* late of *Baltimore,* made his will, and died a few days after. A little previous thereto, he had purchased a plantation of *John Heslip,* and obtained a conveyance of it from him to *John Miller,* and his heirs, in trust for the use of himself and his wife, *Ann Haslett,* for and during their joint natural lives, and the life of the survivor of them, and after the death of the survivor of them, to the use of the heirs of his said wife, forever; and by his will he ratified and confirmed the title to said property to his said wife, her heirs and assigns, forever. The crops growing on the land at the testator's death, were sowed or planted by *Heslip.* After manumitting his slaves, and giving some small legacies, he bequeathed also to his wife a third of his personal estate, and gave the remaining two thirds to his sisters, *Elizabeth Ramsay* and *Mary Hood,* forever, and directed the division to be made after the payment of all his debts. He appointed his wife executrix of his will, which trust she accepted, and under the direction of *Elias Glenn,* esquire, the appellee in this cause, who appears to have acted a kind and friendly part towards the doctor and his family, she applied herself to the settlement of his estate. The will was proved on the 14th day of May 1814, and the 4th day of June following, she returned an inventory of his effects, amounting to $1970 67. On the 14th of the same month the executrix passed her first account with the orphans court, in which she charges herself with the amount of the inventory, with a debt received of *Elias Glenn*, of $237 34, and with a personal chattel, not included in the inventory, to the amount of $6, making an aggregate sum of $2214 01, and obtained an allowance for payments, disbursements and commissions, amounting to $1615 27, leaving a balance against her of $598 74. She does not appear to have done any thing more towards her administration, unless holding possession of all her husband's effects may be so considered, until her death, which took place the 12th of September following. She left a will, and by it devised all her property, real, personal and mixed, to her two nieces *Willmina* and *Julian Stewart*, their heirs and assigns, forever, subject to and charged with the payment of her funeral expenses, debts and legacies, and appointed her friend *Elias Glenn*, her executor. He proved her will in the same month of September, and returned an inventory of her estate, including all the articles of her husband's personal estate appraised by her. It is admitted that the same goods and chattels were sold by him at auction soon after, and by his account of sales, returned to the orphans court, it appears they brought the sum of $3554 66, overrunning the inventory she returned, with the chattels she accounted for, the sum of $1578 93½. In December he passed his first account as executor of her estate, and charged himself with the amount of the inventory returned by him, $2796 05, with the difference between the sales and appraisement $768 61¼, and with cash in his hands $98 62½, making the amount of debits $3653 29¼. He paid funeral expenses, debts, legacies, &c. to the amount of $2139 13, and having obtained in his account an allowance for them, there was left in his hands $1514 16. This sum he charged himself with in his last account, passed at the 1st of December 1819, and reduced it by further payments and disbursements to $468 58, which he admitted to be in his hands undisposed of. At the same time he passed a further account of the estate of Doctor *Haslett*, calling it the second account of *Ann Haslett*, executrix of *William W. Haslett*, rendered by him as her executor. In this settlement he charges himself with $598 74, the balance due on her first account, and is allowed for a payment to the register of $1 50, and her third part of her residuum of her husband's estate to the amount of $199 03, making together $200 58, and leaving no more to be accounted for than $398 16. No part of the legacies of the two sisters of the first testator is alleged to be paid, and why they have stood off, and not asserted their rights, does not appear. The appellant, however, who will be accountable to them for their proportion of what he receives, after having paid the debts, if any remain to be paid, obtained letters *de bonis non* on the estate of *William W. Haslett* on the 21st July 1821, and brought an action of trover in less than a year thereafter. The appellee, the defendant below, pleaded to it the general issue plea, and that the causes of action did not accrue at any time within three years next before the day of the institution of the suit, to which last plea there is a general replication.

There has grown out of these facts several questions of law, which have been discussed in this court with ability, and now await its decision.

The most important among them respects the situation, in a legal view, of the goods and chattels of *William W. Haslett*, taken by the executor of his wife into the administration of her estate—Whether at the time of her decease in September 1814, she was possessed of them in *auter droit*, or had acquired such a right to them, as made them transmissible to her executor? If she had not acquired such a right to them, it is manifest the legatees of the first testator have been injured by the mode of settlement adopted, in the proportion the legatees under the wife's will have been profited by it—the $1578 03½, the gains of the second appraisement, and sales on the first appraisement, having been taken from one set of legatees, and given to the other. The appellee, we are certain, stood indifferent to them both, and if an error has been made in his settlement, we are perfectly sensible it has proceeded wholly from a mistaken apprehension of his duty. To establish the position that the wife made the property of her husband her own in her lifetime, it was contended by the appellee, that she paid the debts of her testator, out of her own funds, to nearly the amount of the appraisement of his estate; that she settled an account of her administration with the orphans court, and was charged by that court with the appraised value of the estate only; and that she had fully administered his effects, and thereby they became her right.

We are of opinion, that neither of the grounds are tenable in this case, and that the position taken is not sustained.

The first is directly opposed to the decision of this court, in the case of *Hall vs. Griffith*, 2 *Harr. & Johns.* 483, where it is decided in so many words, that the appellant, the administrator *de bonis non* in that case, had no right to retain the personal estate at the appraisement on his paying the debts of the deceased to the amount of the inventory. He had been for many years in the administration of the estate, had overpaid the creditors the amount of the inventory, and considered the property his own, and yet he was compelled, by a decree of the orphans court, sanctioned by the opinion of this court, to sell the negroes, and their increase, with the other property, and account to the representatives for the amount of sales. *Ann Haslett* lived about four months only after she took letters testamentary, and it is impossible to say in what light she considered her husband's property in her possession, or what steps might have been taken against her by the creditors or legatees; but we must be allowed to believe, that if a proceeding had been had to compel her to sell, and account for the excess of sales over the appraisement, the ultimate result would have been the same as in the case we have mentioned, upon the principle, that she held and possessed for others, who were entitled to the utmost advantage that could be made of the property. The payments and disbursements she had made *bona fide* towards the settlement of her testator's estate, as well as her own rights derived to her from his will, would unquestionably have been respected in the settlement, superinduced by the proceeding, and suitable allowance would have been made for her trouble and expense in performing her trust. And all these things would doubtless have been equitably accorded to the appellee by the orphans court, if on the death of *Ann Haslett* he had called on the creditors or legatees to take letters of administration *de bonis non,* or had taken them himself, and separated the estates with the aid and advice of that court.

The second ground taken by the appellee's counsel is not more sustainable than the first. The settlement of the account on the 14th of June 1814 with the orphans court, in which the executrix is charged with the amount of the appraisement, according to the inventory, concludes the rights of no person. Such settlements have been determined by this court to be right *prima facie* only, and not to be conclusively binding on persons not parties to them, and who have not had an opportunity of appealing from them. *Spedden vs. The State, use of Marshall and wife,* 3 *Harr. & Johns.* 251, and the cases there cited. The account immediately under our consideration was moreover stated in the manner it is, under the authority of the act of 1798, *ch.* 101, *sub ch.* 10, *s.* 1, and was not intended to express or imply an opinion of the court in relation to the ownership of the property; but if so intended, the court's judgment, authorising the executrix to retain the property as her own, at the appraised valuation, is not conclusive on the legatees of *William W. Haslett,* for the reasons mentioned in the case referred to. The point is not directly decided in the before mentioned case of *Hall vs. Griffith,* but the court could not well have arrived at the legal conclusions drawn by them, if it had been their opinion, that a settlement by the inventory changes the character of the property appearing in it; for it was an admitted fact in the cause, that the administrator *de bonis non* had passed an account, by which it was apparent he had overpaid the appraised value of the estate considerably.

After what has been said, it seems superfluous to declare our opinion, that the executrix, *Ann Haslett,* did not fully administer the estate of her testator, in her lifetime, and that there was a necessity for an administration *de bonis non.* If it is meant that a final account in the orphans court is the best evidence of a full administration, without enquiring into the strength of the proposition, we answer, that no such evidence is to be found in the record before us. The account passed by the executrix in her lifetime, has none of the characteristics of a final account, and the account passed after her death by her executor, was wholly unauthorised by the act of 1816, *ch.* 203.

There are but two items in this last mentioned account, and neither of them relate to the acts, payments or disbursements of the executrix, in her lifetime.

Another question of law discussed before this court, and which we have to decide, arises on the plea of limitations. It was argued, that the action in this case is barred by length of time, as much as six years, if not more, having intervened between the alleged conversion, and the institution of the suit, and that on this score the court below were right in the general instructions given by them to the jury. The argument was met on the part of the appellant with the case of *Hepburn, administrator of Fishwick, vs. Sewell,* which was asserted to be an exactly similar case, and to put an end to the question. We have examined *Hepburn and Sewell,* and compared it with the facts in the record, and are of opinion that it is not an apposite case; but we nevertheless think that this action is not barred by the statute of limitations. In the case referred to, no tortious act was imputed to *Sewell* before letters of administration were obtained by *Hepburn,* and the wrongful conversion complained of was evidenced by a demand and refusal subsequent to the accrual of the right to sue. Here the alleged appropriation and conversion of the property by *Glenn* was long before the letters *de bonis non* were granted to *Smith,* but at a time when there was no person to assert the rights of the creditors and legatees of the deceased *William W. Haslett;* and the court have no doubt, that the statute begins to operate only from the time a right to demand the thing in question vests in some one. It is like the common case of a simple contract creditor dying before his debt becomes due, which his administrator may recover, although more than three years have elapsed from the day of payment to the date of the letters, provided a suit is brought within three years after the date of the letters. Laches cannot be imputed where there is no one to sue, and the cause of action accrue only in a case such as this, from the time there is a competent person to bring it.

A further question was moved in this cause by the appellant's counsel, about which, it appears to us, they were clearly wrong. They contended that the executrix, *Ann Haslett,* ought to have brought into the administration of her husband's estate the crops growing on his land at the time of his decease. The point is, whether, as emblements, they survived to the wife under the trust deed, or made a part of the husband's personal estate? And we decidedly think, that as the crops were sowed or planted by the vendor, *John Heslip*, before he sold to *Haslett*, they went with the land to *Ann Haslett*, who out-lived her husband, and became tenant in fee of the trust estate, the emblements partaking of the nature of the land in this instance, and going with it. It had been otherwise, if the land had been sowed or planted by the husband after his purchase, and the reason is, that the seed committed to the earth by him would not have been cultivated by a joint stock, but would have been entirely and exclusively his property, and be considered in the same situation as if sown in the land of the wife only.

This case has been deliberately considered by us, and we must entertain the opinion, that the court below erred in their instruction to the jury.

We reverse the judgment, and send the cause back under a *procedendo*.

JUDGMENT REVERSED, &c.

* * *

Curtis's Ex'x. *vs.* Bank of Somerset.—June, 1826.

A promissory note drawn by *A*, in favour of *B*, endorsed by *B* to *C* & *D*, *Ex'rs. of T*, and by *C*, one of the *Ex'rs*, endorsed to the plaintiff. C died, and in an action of *assumpsit* on the note against D, in which he is styled in the writ and declaration *Ex'r.* of T, and his liability and undertaking are alleged to be in that character, and he confesses judgment, and the entry of the judgment states it to be against him as *Ex'r.*—On appeal, *Held*, that such judgment was, notwithstanding, a judgment *de bonis propriis.*

Held also, that judgments against Ex'rs. or Adm'rs. upon contracts made by them after the deaths of their testators or intestates, are properly *de bonis propriis*, though they state themselves to contract in their representative capacity, and though they are so called in the proceedings in the actions brought against them upon such contracts.

Appeal from *Somerset* County Court. This was an action of *assumpsit*, brought by the *Bank of Somerset*, (the appellees,) against *Henry K. Long*, and *Susan* his wife, surviving executrix of *Thomas Curtis*, (the appellants,) on a promissory note for $1360, dated the 21st of March 1817, drawn by *James*

Anderson, payable six months after date to *George S. Wilson*, or order, and by him endorsed to *Henry H. Curtis* and *Susan Curtis*, executors of *Thomas Curtis*, or order, and by *Henry H. Curtis*, one of the executors, endorsed to the *Bank of Somerset*. The declaration stated the death of *Henry H Curtis*, one of the executors, and the marriage of the other with *Henry K. Long*. It also stated that notice had been duly given to the endorsors of nonpayment by the maker; and that the said *Henry* and *Susan*, executors as aforesaid, being liable to pay, in consideration thereof assumed upon themselves as executors, and promised to pay, &c. The defendants did not plead, but confessed judgment for the damages laid in the declaration, and costs. They afterwards appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J. by

Wilson, for the Appellants; and by
J. Bayly, for the Appellees.

Earle, J. delivered the opinion of the court. We learned, in the argument of this case, that the appeal was taken therein almost three years after the judgment, under an apprehension that it is a judgment against the assets of *Thomas Curtis*, deceased, in the hands of the appellant, *Susan Long*, which might eventually involve her securities in the testamentary bond. We think those fears were groundless, and that the judgment cannot produce the apprehended consequences, being a correct judgment against *Susan Long*, in her own proper person, and not against the effects of the deceased in her hands to be administered.

A promissory note is the foundation of this suit, and it was endorsed to *Henry Curtis* and *Susan Curtis*, (now *Susan Long*,) the executors of *Thomas Curtis*, and was by them endorsed, in their character of executors, to the *Bank of Somerset*, the plaintiffs in the judgment, and the appellees in this court. Why it was thus endorsed to them, and by them, does not appear, nor doth it appear from the record, what connexion there was between the transaction and the affairs of the testator. If, however, they had endorsed a note, of which he was the holder at his death, it would have made no difference—it would have only rendered them personally liable to the indorsees, it being a contract of their own, entered into by them subsequently to the death of their testator. *Chitty on Bills,* 138, and *King vs. Thom,* 1. *T. R.* 489. On the ground of the endorsement being their own contract, the judgment rendered thereon against them is *de bonis propriis,* although they are called in the writ executors of *Thomas Curtis,* and this appellation is used in the entry of the judgment against them. They contracted as executors, and there was no harm in calling them so in all parts of the proceedings of the action afterwards brought to enforce their engagement. It is a mere *descriptio personæ* of their own creating, which might have been used or dropped at pleasure. That a judgment against a man sued as executor, on a contract entered into by him after the death of his testator, is properly *de bonis propriis,* and not *de bonis testatoris,* is supported by many authorities; one or two only will be referred to by us. The case of *Barry vs. Rush,* 1 *Term Rep.* 691, is of this character, although the Reporter does not state the defendant to have been sued as administrator. The action was on an arbitration bond, entered into by the defendant as administrator, and it was adjudged that he could not plead *plene administravit*; and Judge *Buller,* in delivering his opinion, significantly says, that the administrator, by his bond, bound himself, his heirs, executors and administrators, and undoubtedly became *personally responsible* therein. *Jennings vs. Newman,* 4 *T. R.* 347, is yet a more pointed authority. The plaintiff there sued the defendant in *assumpsit,* on the undertakings of her intestate, and joined therewith a count stating, that after the death of the intestate, the defendant, as administratrix, was indebted to him in £1000, for so much money by the defendant, as such administratrix, received for the use of the plaintiff. This called forth a special demurrer, because the two causes of action, the one from the intestate, and the other from the administratrix, could not be joined. The court were of opinion, and so decided, that those counts could not be joined, because the last count stated a cause of action after the intestate's death, and would warrant a different judgment, clearly meaning thereby a judgment *de bonis propriis.*

Other exceptions were taken on the argument to this record, upon which it is not considered by the court necessary to make any remarks. The judgment is a judgment by confession, and this circumstance does away objections which might otherwise be thought valid.

Archer and **Dorsey**, J. dissented.

JUDGMENT AFFIRMED.

◆

Coursey *vs.* Baker.—June, 1826.

Where there are joint traders, and one of them draws a note, gives a letter of credit or guarantee in the name of all the partners, it binds all.

The act of each partner, in a transaction relating to the partnership, binds all the partners; and to this rule there is no exception, except what may grow out of covin, or such gross negligence as may be equivalent to covin.

A promissory note given by one of two joint partners to W B, for a debt due from the partners to W B and W C, also partners in trade, may be sued on, in the name of W B, and his recovery is as trustee for W B and W C, and enures to their benefit.

Where there was a variance between the date of a promissory note declared upon, and that offered in evidence—*Held*, that as there was a count in the declaration for money had and received, the note was, under that count, properly given in evidence.

Appeal from *Queen-Anne's* county court. Action of assumpsit, brought on the 17th of June 1824, by the appellee against *Lambert W. Spencer*, (who was not arrested on the writ which issued in the cause,) and the appellant. The declaration contained two counts—one on a promissory note, stated to have been made by *Spencer* and *Coursey*, carrying on trade and commerce, in their partnership name of *Lambert W. Spencer & Co.* on the 14th of May 1820, and payable on demand to the appellee, or order, for $1106 95, with interest thereon from and after the 1st of December 1818. The other count was for money had and received. The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos.* The plaintiff joined issue on the first plea, and replied the general replications to the other pleas, and issues were joined.

At the trial the plaintiff read in evidence the following note:

"$1106 95. *Baltimore,* May 6th, 1820.

On demand, we promise to pay *William Baker,* or order, one thousand one hundred and six dollars and ninety-five cents, for value received, with legal interest thereon from and after the first day of December, one thousand eight hundred and eighteen. *Lambert W. Spencer & Co.*"

He further read in evidence from the ledger of *Lambert W. Spencer & Co.* the account stated in the name of *Lambert W. Spencer & Co.* against *William Baker & Son,* commencing on the 3d of April 1817, and ending on the 7th of March 1818. On the 1st of December 1818, the balance stated by this account to be due to *William Baker & Son,* was $1106 95, and the account was closed by the following entry: "1820, May 6. To our note this day, on interest from the 1st day of December 1818, given to *William Baker,* $1106 95." The plaintiff then proved by one *Stewart Redman,* that *Gerald Coursey* and *Lambert W. Spencer* carried on trade together at *Easton,* till the year 1818; that in November 1818, the store was broken up at *Easton*; that *G. Coursey* took part of the goods, and *Lambert W. Spencer* took part, but a greater part were carried up to *Wye Landing,* which is distant from *Easton* about fourteen miles; and that he the witness then became concerned with *Spencer and Coursey,* and a firm was established in the name of *Stewart Redman & Co.* of which the witness, *Lambert W. Spencer,* and *Gerald Coursey,* were partners; and that the goods which were brought from *Easton,* of the firm of *Lambert W. Spencer & Co.* together with other goods, were sold at that place by said firm of *Redman & Co.* The plaintiff also proved by the same witness, that he, the witness, had heard a conversation in 1821, between *Spencer* and *Coursey,* in relation to the affairs of *Lambert W. Spencer & Co.* with *William Baker & Son,* and that *Spencer* insisted that this debt ought to be paid by *Coursey,* and that *Coursey* insisted that it ought to be paid by *Spencer.* The witness also proved that the firm of *William Baker & Son,* in the years 1816, 1817 and 1818, consisted of *William Baker* and *Joseph Baker*; and that *William Baker,* (the plaintiff,) and *Joseph Baker,* resided in the city of *Baltimore* in 1818, and are still alive. The witness also proved, that in 1823 he had a conversation with *Lambert W. Spencer*, who told him that a short time before, he, and *G. Coursey* and *William Baker*, had a meeting, when the books were produced for the purpose of ascertaining the situation of the parties in relation to the partnership, and to see what each of them ought to pay, but that nothing effectual was done; that *Baker* made figures and calculations, and that *Coursey* was found considerably in arrear. The defendant then proved by one *John C. Ruth*, who acted as clerk for *Lambert W. Spencer & Co.* at *Easton*, in the years 1816, 1817 and 1818, that the first, second, third, fourth and fifth lines, in the entries on the debit side of the account produced by the plaintiff, and also all the first, second, third, fourth and fifth lines, in the credit part of the account, were in his handwriting; that the sixth line in the credit part of the account, and the addition of the same, and the sixth and seventh lines in the debit part, and the addition of the same, and also the balance struck, was in the handwriting of *William Baker*, the plaintiff, and that the writing on the account of the 6th of May 1820 was *Lambert W. Spencer's*, one of the partners of *Lambert W. Spencer & Co.* The court having decided on the prayer of the defendant, that if the note in question was given after the dissolution of the partnership, without his consent, he was not obliged to pay it, the defendant then prayed the court to instruct the jury, on the supposition that the note was given during the existence of the partnership, that if they believed from the evidence that it was given to *William Baker*, in consideration of a debt due from *Lambert W. Spencer* and *Gerald Coursey*, trading under the firm of *Lambert W. Spencer & Co.* to *William Baker* and *Joseph Baker*, trading under the firm of *William Baker & Son*, they must find a verdict for the defendant, unless they also believed from the evidence that it was given with the approbation and knowledge of *Coursey*, the defendant. This instruction the Court, [*Earle*, Ch. J. and *Purnell*, A. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Ch. J. and Martin, Stephen, Archer, and Dorsey, J. by

Carmichael and *W. A. Spencer*, for the Appellant; and by *Chambers* and *R. Spencer*, for the Appellee.

Archer, J. delivered the opinion of the court. The prayer to the court below, the rejection of which gave rise to the present appeal, presupposes, and is bottomed upon, the existence of the partnership between *Spencer* & *Coursey*, at the time the promissory note was drawn, upon which this suit was instituted. This note was drawn by *Spencer*, in the name of the firm, for a debt due from the firm to *William Baker & Son.*

It is a settled principle, that where there are joint traders, and one draw a note, give a letter of credit, or guarantee in the name of all the partners, it binds all. The act of every single partner, in a transaction relating to the partnership, binds all the others. No exception is known to this general rule, except what may grow out of covin, or such gross negligence as may be equivalent to covin. Now in this case no fraud is imputable to *Baker* & *Son*; the note was drawn for and on account of a debt due from *Spencer & Co.* and appears to have been in the usual course of mercantile transactions. The power of one partner to bind another by bills and notes drawn in the name of the firm, it is true, is only an implied power, and *Spencer & Co.* might have stipulated to the contrary; and if a third person, having notice of such a stipulation, had in defiance of such notice and stipulation, accepted a security so drawn, the right of such person to a recovery might well be questioned. *Gallway v. Matthew & Smithson*, 10 *East*, 264. But here there is no pretence for questioning the validity of this instrument upon such grounds. The note is executed by one of the firm, in the name of the firm, in the course of their business, according to the custom of merchants, and pursuant to the implied power which he had, from the nature of the case, to contract for, and bind the company. No express assent or approbation was necessary to make it obligatory upon both.

This note was then binding on the firm, unless its having been given to *William Baker* alone, instead of being drawn payable to *Baker & Son*, can exonerate the firm from liability. Authorities need not be adduced to shew that *Baker* could have given a release which would have discharged the firm of *Spen-*

cer & Co. A payment to him would have been equivalent to a payment to him and his copartner. This being the case, can it be doubted but that a recovery in this action would enure to the benefit of *Baker & Son*, and that *Spencer & Co.* would, by such recovery, be discharged from all liability upon the original cause of action? It is certainly true that the note given does not extinguish or merge the original cause of action of *Baker & Son*, unless it had been received in satisfaction of the debt; but they could not recover on such original cause of action until this note, taken by one of the firm, should be proved to have been lost, or produced and cancelled at the trial. *The Patapsco Insurance Company vs. Smith, et al.* 6 *Harr. & Johns.* 170. Yet a suit is certainly sustainable upon the note in the name of the payee, in whom the legal title is alone vested, and he *recovers as a Trustee for Baker & Son. Van Ness vs. Forrest*, 8 *Cranch*, 34.

As to the question which has been raised relative to a variance between the date of the note offered in evidence, and that declared upon, it is only necessary to observe, that the promissory note was properly given in evidence under the count for money had and received.

We concur with the court below.

JUDGMENT AFFIRMED.

* * *

Bowers's Adm'x. *vs.* The State, use of Dryden.—June, 1826.

A debt or right of action, cannot be extinguished by the acceptance of an obligation or undertaking of equal dignity—it must be one of higher grade to produce that effect.

A *feme sole*, of the age of 16 years, passed her receipt to her guardian for the full amount of her personal estate, without having received it, but in consideration of her guardian's single bill, payable at a future day, for the amount of her personal estate—*Held*, that the guardian's bond was still liable, and that an action might be maintained upon it to recover the value of said estate.

Appeal from *Kent* County Court. Debt upon the guardian bond of *William Bowers*, dated the 10th of May 1806, brought against the administratrix, (the appellant,) of one of the sureties in the bond. The condition of the bond was, that *Bowers*, "as guardian to *Ann Coburn*, shall faithfully account with the orphans court of *Kent* county, as directed by law, for the management of the property and estate of the orphan under his care; and shall also deliver up the said property, agreeably to the order of the said court, or the directions of law; and shall in all respects perform the duty of guardian to the said *Ann Coburn* according to law." There were no pleadings in the cause, but a judgment was rendered, with the consent of the parties, *pro forma*, for the plaintiff, subject to the opinion of the court on the following case: The bond, upon which the action was brought, was executed, as it purports to have been. *Ann B. Coburn* was born in October 1798, and intermarried with *Samuel Dryden*, for whose use this action was brought, in the year 1820, and she died in November 1822. The amount of estate due from *William Bowers*, as guardian to *Ann B. Coburn*, on the 7th of August 1816, was $330 21. On the 7th of August 1816, the following single bill was executed: "I promise and oblige myself, my heirs, executors or administrators, to pay, or cause to be paid, unto *Ann B. Coburn*, the just and full sum of three hundred and thirty dollars and 21 cents, (it being the amount of her personal estate,) on or before the first day of October eighteen hundred and eighteen, with legal interest until paid. As witness my hand and seal this seventh day of August one thousand eight hundred and sixteen.

Wm. Bowers, (L. S.)

Test. *Mary Ann Bowers.*"

This single bill was executed and delivered to, and received by, *Ann B. Coburn*, in payment of the said amount due from *William Bowers*, as her guardian. On the 8th of August 1816, *Ann B. Coburn* executed the following receipt: "Received of *William Bowers*, the full amount of my personal estate this eighth day of August 1816.

Ann B. Coburn.

Test. *James Ross.*"

This receipt was delivered by *Ann B. Coburn* to *William Bowers*, in consideration only of the single bill received by her as aforesaid; and on the 25th of September 1816, she made the acknowledgment endorsed on it, and which was in the usual form, before a justice of the peace for *Kent* county; which receipt and acknowledgment, were recorded by the register of wills for *Kent* county on the 15th of February 1824, for the first time. From the *pro forma* judgment, the defendant appealed to this court.

The cause was argued at June term last before Buchanan, Ch. J. and Martin, Stephen, and Archer, J.

W. H. Barroll, for the Appellant, contended, 1. That a receipt or final discharge by a ward, after attaining full age, is proper in itself.

2. Such a receipt or discharge can only be impeached on the ground of positive fraud; and that it did not in its effect operate as a gratuity to the guardian, so as to bring it within the principle of those cases in which grants and gifts to a guardian are avoided on the ground of public utility.

3. The surety was only bound for the acts of *William Bowers* as guardian; and if a legal liability once existed, being without gain or profit to himself, his administratrix is entitled to avail herself of every legal advantage for her discharge from such liability.

4. The discharge of the principal is a discharge of the sureties.

5. The bond sued upon is distinguishable from a bond to an individual, conditioned for the payment of a specific sum of money.

6. If *Dryden*, for whose use the action was brought, ever had a cause of action against the sureties on the guardian bond, after his intermarriage with *Ann B. Coburn*, and after her death, he waived that right by accepting the single bill.

He referred to the acts of 1798, *ch.* 101, *subch.* 12, *s.* 1; 1809, *ch.* 168; and 1816, *ch.* 34. *Duke of Hamilton vs. Lord Mohun*, 1 *P. Wms.* 118. S. C. 1 *Salk.* 158. *Clayton vs. Kinaston*, 1 *Ld. Raym.* 419. S. C. 2 *Salk.* 573. *Kerby vs. Taylor*, 6 *Johns. Chan. Rep.* 242, 249. *King vs. Baldwin*, 2 *Johns. Chan. Rep.* 559, 560. *Skip vs. Huey, et al.* 3 *Atk.* 91. *Rees vs. Berrington*, 2 *Ves. jr.* 540. *People vs. Jansen*, 7 *Johns. Rep.* 332; and *Blake's* case, 6 *Coke*, 43.

Chambers, for the Appellee, contended, that under the circumstances of the case, the receipt given by *Ann B. Co-*

burn, did not discharge the liability of the obligors in the guardian's bond—1. Because the receipt was without consideration, and therefore inoperative. 2. Because, not being under seal it could not be considered as a release. He cited *Pannel's* case, 5 *Coke*, 117. *Cumber vs. Wane*, 1 *Stra.* 426. *Williamson vs. Andrew*, 4 *Harr. & M'Hen.* 482. *Fitch vs. Sutton*, 5 *East*, 230. *People vs. Jansen*, 7 *Johns. Rep.* 338. *Paine vs. Packard*, 13 *Johns. Rep.* 174. *Rathbone vs. Warren*, 10 *Johns. Rep.* 595. *Trent Navigation Company vs. Hurley*, 10 *East*, 34; and also *Blake's* case, 6 *Coke*, 43.

Curia adv. vult.

STEPHEN, J. at this term delivered the opinion of the court. This action was instituted in the court below, upon a bond executed by *William Bowers*, as guardian to *Ann B. Coburn*, in which bond *John Bowers*, the defendant's intestate, united with him as surety. *Ann B. Coburn*, after she obtained the age of 16 years, passed her receipt to *William Bowers* for the full amount of her personal estate, without having received the same, but in consideration of a single bill, which was executed and delivered to her by her guardian, in which he bound himself to pay at a future day the sum of $330 21, it being, as the bill expresses it, the amount of her personal estate, with legal interest till paid. And the sole question for this court to decide is, whether, in consequence of this transaction between the ward, (after she had attained the age of 16 years, and became by the law of this state entitled to the possession of her estate,) and her guardian, all legal liability on the part of *John Bowers*, his surety in the bond, ceased and determined? It is a well established principle of law, that a debt or right of action cannot be extinguished by the acceptance of an obligation or undertaking of equal dignity; it must be one of higher grade in the estimation of the law to produce that effect. See *Williamson vs. Andrew*, 4 *Harr. & M'Hen.* 482, where this principle was settled by the court. That was an action of debt on a bond, and the defendant pleaded that he made a mortgage to secure the payment of the money, and the plaintiff accepted thereof in satisfaction; on demurrer, the court gave judgment for the plaintiff. In 3 *Bacon's Abridgment*, title *Extinguishment*, 107, the law is stated to be, that the accepting of a security of equal degree, is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another.

This is a well settled law in cases of contract made between parties having a general legal capacity to contract; but in the case before the court, it appears that *Ann B. Coburn* had not attained the age of twenty-one years, and consequently had not such general power of contracting; but with reference to her capacity to make such an agreement, she was still, in contemplation of the law, a minor. This principle was solemnly established by this court in *Davis vs. Jacquin & Pomerat*, 5 *Harr. & Johns.* 100, where the court express their opinion in the following terms: "The object of the law, (meaning the act of 1798,) was to enable an infant female, at the age of sixteen, to receive from her guardian, and take into her possession, her real and personal estate. So far the law conferred on her a new capacity; but this capacity does not destroy the state of legal minority, because it is consistent with it." In this case it is moreover to be considered, that the security taken by *Ann B. Coburn*, was less beneficial to her than the one she before had; because, not only was the time of payment extended, and a risk of eventual loss thereby incurred, but it was the single bill of her guardian alone, without the joint responsibility of a surety

JUDGMENT AFFIRMED.

* * *

DAVIS VS. DAVIS, *et al.*—June, 1826.

It is the province of the court to determine all questions of law arising before them; and of the jury to find all matters of fact, when evidence legally sufficient for that purpose is submitted to their consideration; but this legal sufficiency is a question of law, of which the court are the exclusive judges.

Whenever testimony is so light and inconclusive that no rational mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury, that there is no evidence before them to warrant their finding the fact so attempted to be proved.

APPEAL from *Cecil* County Court. *Assumpsit* for money had and received, brought by the appellees against the appellant.

The cause, which is fully stated by the judge who delivered the opinion of this court, was argued before Buchanan, Ch. J. and Martin, Stephen, Archer, and Dorsey, J.

Chambers, for the Appellant, contended—1. That the action for money had and received would not lie on the facts disclosed in the record—Because those facts shew a special contract, which should have been declared upon; because also the goods alleged to have been sold were not exclusively the goods of the plaintiffs below; and because no *money* was proved to have been received by the defendant. 2. The evidence was not the best that could be offered to prove the quantum of damages, and was not sufficient to direct the jury to a rational or sensible conclusion as to the amount claimed. 3. That the sale of the growing crop was as much within the statute of frauds as the sale of land, and it not being in writing in this case, it was void. He cited *Briston vs. Waddington*, 5 *Bos. & Pull.* 355. 2 *Phill. Evid.* 83, (and *note.*) *Towers vs. Barrett*, 1 *T. R.* 133. *Raymond vs. Bearnard*, 12 *Johns. Rep.* 274. *Jennings vs. Camp*, 13 *Johns. Rep.* 94. *Clark vs. Smith*, 14 *Johns. Rep.* 326. *Crosby vs. Wadsworth*, 6 *East*, 602, 609, 610, and *Emmerson vs. Heelis*, 2 *Taunt.* 38.

Gale and *Carmichael*, for the Appellees, cited *Parker vs. Fassitt*, 1 *Harr. & Johns.* 339. *Stennel vs. Hogg*, 1 *Saund.* 228, (*note* 1.) The acts of 1763, *ch.* 23, *s.* 2; and 1809, *ch.* 153, *s.* 12. *Coursey vs. Covington*, 5 *Harr. & Johns.* 45. *Mercer vs. Walmsley*, *Ibid* 27. *Longchamp vs. Kenny*, 1 *Dougl.* 132; and 1 *Phill. Evid* 111.

Dorsey, J. delivered the opinion of the court. The appellees, by *Richard Davis*, their guardian, instituted in *Cecil* county court an action for money had and received; and upon *non assumpsit* pleaded, the plaintiffs at the trial called *William Hackett*, by whom they proved that he was the crier of the vendue on or about the 18th of February 1819, at the sale of the real estate of *John Davis*, deceased, by *Jeremiah Cosden*, the trustee, at which time the defendant became the highest bidder and purchaser; that at the time of the sale he notified the persons present, that they purchased subject to these terms: *First.* That the tenant should continue on the farm to the end of his lease, which would expire on the first of January then next. *Secondly.* That as much wheat was to be returned to *Richard Davis* as he had furnished for seed wheat the fall before, (the quantity of which was not mentioned). And *Thirdly.* That the heirs of *John Davis* (who are the plaintiffs in the cause,) should be entitled to a proportion of the rent, which was said to be a grain rent, to be calculated from the fall of 1818, when the wheat was seeded, to the day of sale. The plaintiffs then called *Cornelius C. Money*, by whom they proved that he was tenant on the farm at the time of the sale to the defendant; that *Richard Davis*, and himself, had found two hundred and nineteen and a half bushels of wheat. That the witness, in the summer of 1819, cut, gathered, and secured the crop of wheat, and delivered, by defendant's direction, to *Richard Davis*, one hundred and nine bushels and three pecks of wheat, and retained the same quantity for himself for seed wheat found in 1818. That he seeded one hundred and eighty-seven and a half bushels of the balance of the crop on the farm, in the fall of 1819, by defendant's instruction, and divided the residue between the defendant and himself. That he afterwards, at different periods, from September to the last of December 1819, carried the share delivered to the defendant, by his order, to *William F. Corbett*, of *Apoquiniminck*, with whom he left it by defendant's order. That he sold part of his own wheat to said *Corbett* at different times, and saw other persons deliver wheat to him. The plaintiff then called *George Ford*, by whom he proved that *William F. Corbett* was a merchant and wheat buyer in *Apoquiniminck* in 1809, when the witness resided with him, and that he has continued in the same business from that time until about two years past.

The defendant then moved the court to instruct the jury, that the evidence offered was not sufficient to maintain the plaintiff's case. Which instruction being refused, the defendant excepted, and now calls on this tribunal to revise and reverse the opinion thus given by the court below.

It is the peculiar province of the court to determine all questions of law arising before them; and the undoubted right of the jury to find all matters of fact, when evidence legally sufficient for that purpose is submitted to their consideration. And this legal sufficiency is a question of law, of which the court are the exclusive judges. Wherever the testimony, adduced by a plaintiff, is so light and inconclusive, that no rational well constructed mind, can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved. Such is the doctrine sanctioned by long practice and judicial determinations, as well in this state as *Great Britain*; and the expediency and wisdom of the principle is too obvious to be questioned.

The form of the prayer, in itself, not authorising its rejection by the court, can their decision be supported by the proof in the cause? Unquestionably not. 'Tis true the auctioneer states it was "said to be a grain rent." But whether it be a rent payable in wheat, rye, oats, Indian corn or barley, does not appear; nor can it be collected from the proof in the case, whether it be of one bushel or one thousand bushels of grain. Suppose, however, these difficulties obviated, and it were proved that the rent was of wheat, and the quantity stipulated in the contract of demise—Is there a particle of testimony to shew the quantity delivered; whether it be five bushels or five hundred bushels? Whether the price at which it sold be 25 cents or two dollars per bushel? Or indeed that there ever was one bushel of wheat delivered by the tenant to the appellant as rent reserved to the appellees by the terms of sale. In the absence of proof on all these important particulars, upon what basis can the verdict of the jury be predicated? Certainly not upon any evidence appearing in the record. The court below, therefore, erred in refusing to give the instruction prayed by the appellant.

The judgment is therefore reversed, and a *procedendo* ordered.

JUDGMENT REVERSED, &C.

THE STATE use of SCOFFIELD's Adm'r. *vs.* CRADDOCK.–June 1826

During a contest about the will of a deceased person, letters of administration *pendente lite* were granted to A, who gave bond with sureties. A creditor of the deceased brought an action against the administrator *pendente lite*, and the writ was returned *non est inventus*. An action was then brought on the administration bond, against one of the sureties therein, and was pending when the contest about the will was decided, by admitting the will to probat, but no letters testamentary were taken out on the estate of the deceased.—*Held*, that the authority, under the letters *pendente lite*, was at an end when the contest about the will terminated in the orphans court. Also, that suits upon the special administration bond, whether against the principal, or his sureties, might be abated by them.

APPEAL from *Cecil* County Court. This case, which is fully stated by the judge who delivered the opinion of this court, was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J. by

Gale, for the Appellant; and by
Chambers and *Stump*, for the Appellee.

EARLE, J. delivered the opinion of the court. This is a suit on the administration bond of *Andrew P. Redding*, administrator *pendente lite* of *Andrew I. Peterson*, deceased, brought against *Richard Craddock*, one of his sureties. The points to be decided arise from a statement of facts agreed upon between the parties. By this it appears that *Scoffield* was a fair creditor of *Peterson*, and that *Wroth*, *Scoffield's* administrator, sued for the debt to September term of *Cecil* county court 1822, bringing his writ against *Andrew P. Redding*, administrator *pendente lite* of *Andrew I. Peterson*, which was returned *non est inventus*. That the action was thereupon instituted on the administration bond, and was pending on the 14th of April 1824, when the contest about the will of *Andrew I. Peterson* was terminated by a decision of the orphans court, "that the will be admitted to probat;" but that no further proceedings have been had in said court, or elsewhere, in relation to it. The questions to be adjudicated are, whether the letters *pendente lite* were at an end when the contest about the will terminated in the orphans court, although letters testamentary have not been taken out on the estate of *Andrew I. Peterson?* And whether this defendant can abate the suit on the administration bond, if the special administration ceased with the contest in the orphans court?

The first question depends for a solution on the nature of the letters *pendente lite*, and the sound construction of the acts of assembly on this subject; and the court are of opinion, that the authority under the letters was at an end when the contest about the will terminated in the orphans court. The authority under the letters, from the very terms of them, can continue no longer than while there is a controversy about the will, and when the contest is at an end, the power derived from the letters immediately ceases. It is like letters during the absence of the executor, the effect of which is determined on his return to the state. The act of 1810, *ch.* 84, *s.* 6, is not opposed to this principle. The words of the proviso are, that upon *a decision* had on such contested will, the same proceeding shall be had, &c. thus making the special administrator answerable to the executor from that period, upon the ground that his power then ceases, and his responsibility to the executor from that point of time commences. The neglect to take letters testamentary in this particular case does not alter the principle.

If the suit had been depending against the administrator *pendente lite*, on the 14th of April 1824, when the orphans court decided in favour of the probat of the will, the authorities are clear, that it might have been abated by him, by a plea *puis darrein continuance*. So is *Sparks vs. Crofts*, 1 *Ld. Raym.* 265, and *Carth.* 432. The only authority that looks like opposition to this, is 3 *Bac. Ab.* tit. *Executors & Administrators,* (B 2) 14. *Bacon* says, that where administration determines pending the action, the special administrator ought to retain assets to satisfy the debt attached on him by the action. But this does not deny to him the means of abating the suit. As we conceive, it only provides him with redress, in case he neglects or omits to use the plea at the next continuance, and the authorities, therefore, may be well reconciled. The question then is, can this privilege of the special administrator be extended to a suit on the administration bond against his surety? And why should it not be extended to him? Is the principal to possess a privilege which is denied to his surety? The administrator *pendente lite* abates all the suits against him, settles finally with the executor, and pays over to him all the assets in his hands, and his security is to be left to contend with a creditor, without the means of abating the suit, and without the means of retaining assets to discharge the judgment, if one should be obtained against him. This law, it must be admitted, would impose unusual hardships, and it ought not to be so settled unless there is an imperious necessity for it. The court do not feel that there is such a necessity. The matter in abatement does not go to the cause of action, or to a denial of *Scoffield's* claim, but it proposes to put an end to that particular suit, by reason of the peculiar situation of the defendant, and those with whom he is connected by his engagements. The suit might have been abated by the plea of the principal, if sued on the administration bond, for it is another remedy only against him for the same debt; and for the same reason, if it is not a stronger one, it may be abated as to the security.

JUDGMENT AFFIRMED.

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HANDY *vs.* THE STATE, use of TOWNSEND.—June, 1826.

Where an instrument of writing purports to have been attested by a person, whose name is subscribed as a witness, it must be proved by the testimony of such witness, unless he cannot be procured, by reason of his absence, death, interest, or other disqualification, subsequent to the attestation; in which case evidence may be given of his handwriting, and it is also usual to prove the signature of the contracting party.

The party is not concluded by the testimony of the subscribing witness; as, if he denies his attestation, it may be proved by other witnesses; or if he denies the due execution of the instrument, other testimony may be resorted to, to prove it, &c.

So where it can be proved, that the name of a person appearing as a subscribing witness to an instrument of writing was written by another without his knowledge or assent, the party may be permitted to prove it, and in such case, he is not to be considered as an attesting witness—it stands as an instrument without an attesting witness, and subject to be proved by any other admissible evidence.

In an action on a testamentary bond, brought at the instance of the only daughter of the deceased, to recover two thirds of what remained in the hands of the executrix of the personal estate of her father, after payment of debts, &c. the will of the deceased was offered in evidence, with the endorsements thereon, stating that the will was proved on the 25th of November 1800. Also an endorsement of the same date, every line and word of which, except the date, was cancelled and obliterated by a pen being drawn through each line, purporting to be a renunciation (in substance such as is required by the act of 1798, *ch.* 101, *sub ch.* 13, *s.* 2,) executed by the widow of the testator, by making her mark, and also purporting to be attested by J B R, the register of wills, both whose names, together with the mark, being in like manner obliterated. Also another endorsement, purporting to be a certificate by J B R, the register of wills, that on the same day A T, the widow of the deceased, appeared and quitted claim to the several bequests and devises made to her in the will of her husband, and elected in lieu thereof her dower or third part of his estate, both real and personal. There was proof that A T was an illiterate woman, and could not write. It was also proved by J B R that he did not see A T put her mark to the said written renunciation, and that his name signed to it as a subscribing witness was not in his handwriting, but in the handwriting of E W, who was then his deputy, and is since dead, and that the whole writing was in the hand of E W, who was in the habit, but without authority, of signing his, J B R's name, as a witness to other than official papers.—*Held,* that the obliterated paper, purporting to be a renunciation of A T, was not admissible in evidence. *Held* also, that the writing, purporting to be a certificate by the register of wills, that A T did, on the 25th of November 1800, renounce the bequest to her husband's will, was an act not required or authorised by law, and was not admissible in evidence to prove the execution of a renunciation by her.

Though illegal evidence is received by the inferior court without objection, it may still be rejected by the appellate court.

If an instrument of writing be mutilated, it is *prima facie* evidence of cancellation; though proof may be admitted to show that the mutilation was by accident or fraud.

In this action it was admitted that no guardian had been appointed for the equitable plaintiff during her minority, which expired on the 10th of March 1814, when she arrived at the age of 16 years—*Held* by the county court, that she was not entitled to interest on the sum claimed by her except from that period.

Appeal from *Worcester* County Court. Debt upon the testamentary bond, executed on the 27th of November 1800, by *Ann Townsend,* as the executrix of *Levin Townsend,* with *Thomas R. Handy,* (the defendant and now appellant,) and *James Atkinson,* her sureties. The defendant pleaded general performance. The replication stated that *Levin Townsend* by his will, amongst other things, bequeathed to his wife *Ann* all his personal estate during her widowhood, and at the expiration of her widowhood, that all his personal estate "should be equally divided between his two daughters *Nancy* and *Sarah,* or either of them dying, all and each part to the surviving sister, except an heir of either's body, then and in that case to the children of the above mentioned daughters." That *Ann,* the widow, after the death of *Levin,* within 90 days after the authentication and probat of the will, delivered to the orphans court a written renunciation of any bequest or devise made to her by the said will, and did elect to take in lieu thereof her dower or legal share of her said husband's estate, which entitled her by law to one third part of the clear balance of her husband's personal estate. That on the 4th of September 1801, in the life of the said *Ann*, who is since dead, there remained in her hands, as executrix of the said *Levin*, of the clear estate of the said *Levin*, as settled by her after all payments, allowances, and her thirds deducted, the sum of $444 09, as by her account, passed and allowed by the orphans court. And that *Sally Townsend*, at whose instance and for whose use this action was brought, and who is the same *Sally* or *Sarah* mentioned in the said will, and as such entitled to the clear estate of her father by virtue of his will, and by reason of her having survived her said sister *Nancy*, who died an infant in the lifetime of her father, and without leaving issue, or ever having had issue. Breach, the nonpayment of the said sum of $444 09, &c. The rejoinder stated that *Ann*, the widow, did not, within 90 days or at any time after the authentication and probat of the will, deliver to the orphans court a written renunciation of any bequest or devise made to her by the will, and elect to take in lieu thereof her dower or legal share of her husband's estate. Issue joined.

1. At the trial the plaintiff offered in evidence the bond upon which the action was brought, and the will of *Levin Townsend*, dated the 24th of September 1800, bequeathing *(inter alia)* as follows: "*Item.* The lot on which I now live, and all the rest of my property, I leave unto my beloved wife *Ann Townsend*, during her widowhood. At the expiration of *each*, my will is, the property above mentioned should be equally divided between my two daughters, *Nancy* and *Sarah*, or either of them dying, all and each part to the surviving sister, except an heir of either's body, then in that case to the children of the above mentioned daughters;" and he appointed his wife *Ann* his executrix, and *John Cottingham* his executor. The will was proved by *Ann*, the executrix, and by the subscribing witnesses, on the 25th of November 1800, and letters

testamentary, which were offered in evidence, were granted to *Ann*, the executrix, on the 27th of November 1800. The plaintiff then offered in evidence the following acknowledgment of the renunciation of *Ann Townsend*, the executrix, purporting to have been made before *James B. Robins*, register of wills for *Worcester* county, viz. "*Worcester* county, sct. The 25th day of Novr. 1800, then came *Ann Townsend*, the widow of *Levin Townsend*, late of *Worcester* county, deceased, and quitted claim to the several bequests and devises made to her in the will of her said husband, deceased, and elected in lieu thereof her dower or third part of the deceased's estate, both real and personal.

Before, *James B. Robins*, Reg. W. W. C."

The plaintiff then offered the following paper in evidence, after proving that it was an exact copy from the original endorsement on the said will: "Novr. 25th 1800, came *Ann Townsend*, & (a) [Novr. 25th 1800, and *Worcester* county, sct. hereby I hereby certify, that she did hereby renounce ally her right and title to my said husband *Levin Townsend* will, and electietieth in lieu thereof to take my third part of my said husband estate, both real and personal.

her
Ann X *Townsend*
mark

Test. *James B. Robins*, Reg. W. W. C."

The plaintiff proved also, that the said *Ann Townsend* was an illiterate woman, and could not write. The plaintiff then produced the original will, and called *James B. Robins*, the subscribing witness to the last mentioned endorsement, who testified that he did not see *Ann Townsend* put her mark to the said paper, and that his name signed to it as a witness is not in his handwriting; but proved that a certain *Ezekiel Wise* was his deputy, and that the whole writing was in the handwriting of *Wise*, who is dead. And also proved that he *Robins* was the register of wills of said county, and that

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(a) The part here in crotchets was all crossed and obliterated, and where blanks are left the words were not intelligible.

Wise, his deputy, was authorised to sign his *Robins's* name to all official acts, but was not deputed to sign his name as a witness to other papers; but that he *Wise* was in the habit of doing so. The defendant on his part objected then to the said paper, purporting to be a renunciation, going to the jury as evidence. But the Court, [*Robins* and *Whittington*, A. J.] overruled the objection, and permitted the paper endorsement last mentioned to go to the jury. The defendant excepted.

2. It having been admitted that no guardian had been appointed or existed for *Sally Townsend*, the equitable plaintiff, during her minority, which expired on the 10th of March 1814, at which time she arrived at the age of sixteen years, the defendant prayed the court to direct the jury, that the plaintiff could not recover interest on the sum claimed by her but from that period. This direction the Court, [*Martin*, Ch. J. and *Robins*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN, ARCHER, and DORSEY, J. by

Wilson and *A. Spence*, for the Appellant; and by
J. Bayly and *Tingle*, for the Appellee.

BUCHANAN, Ch. J. delivered the opinion of the court. By the act of 1798, *ch.* 101, *sub ch.* 13, *s.* 2, it is provided that a widow should be barred of her right of dower in the land, or share in the personal estate of her husband, by any devise to her of land, or any estate therein, or bequest of personal property, in his will, unless within ninety days after the authentication or probat of the will she shall deliver or transmit to the court, where such authentication or probat hath been made, a written renunciation in the form therein prescribed, or to the same effect.

On the 24th of September, 1800, *Levin Townsend* made his will, in which he bequeathed the whole of his property to his wife *Ann Townsend*, during her widowhood, and after, to his two daughters *Nancy* and *Sarah*, and the survivor, &c. and appointed his wife his executrix, who executed and filed her bond according to law, in the proper office, with *Thomas R. Handy*, the appellant, as one of her sureties, and took out letters testamentary. *Nancy Townsend* died in the lifetime of her father, without having ever had any issue; and this suit was instituted on the testamentary bond of *Ann Townsend*, the executrix, who was at that time dead, against the appellant *Thomas R. Handy*, one of her sureties, at the instance and for the use of *Sarah Townsend*, the surviving daughter of *Levin Townsend*, to recover two-thirds of what remained in the hands of *Ann Townsend*, of the clear personal estate of *Levin Townsend*, after payment of all demands, &c. against the estate, and a final settlement in the orphans court.

The appellant, who was defendant below, pleaded general performance of the condition of the bond by *Ann Townsend*, the executrix; and the replication, after protesting that *Ann Townsend* had not performed, &c. all that was required of her to be performed by the condition of the bond, &c. alleges, *inter alia*, that she did, within ninety days after the authentication and probat of the will of *Levin Townsend*, deliver to the orphans court of *Worcester* county, where the authentication and probat were made, a written renunciation of the bequest made to her in the said will, and election to take in lieu thereof her dower or legal share of her husband's estate, whereby she became entitled by law to only one third part of the clear balance of his personal estate. On this allegation in the replication issue was joined. On the back of the will is an endorsement by the register, that on the 25th of November, in the year 1800, *Ann Townsend* came and made oath that it was the true and whole will of *Levin Townsend* that had come to her hands or possession, and that she did not know of any other. Immediately following is also an endorsement of the same date, every line and word of which, except the date, is cancelled and obliterated by a pen being drawn through each, purporting to be a renunciation, (in substance such as is required by the act of 1798, *ch.* 101, *sub ch.* 13, *s.* 2,) executed by *Ann Townsend*, by making her mark, and also purporting to be attested by *James B. Robins*, the then register of wills, both whose names, together with the mark, being also in like manner obliterated. Then follows another endorsement, purporting to be a certificate by *James B. Robins*, the register of wills, that on the same day, (the 25th of November 1800,) *Ann Townsend* appeared and quitted claim to the several bequests and devises made to her in the will of her husband, and elected in lieu thereof her dower or third part of his estate, both real and personal. After which, and as of the same date, is the probat, also endorsed on the back of the will.

At the trial of the cause, the will, and the endorsement purporting to be a certificate by the register of wills, that *Ann Townsend* had renounced the bequest to her by her deceased husband in his will, having been first given in evidence, as appears by the statement in the bill of exceptions, the obliterated endorsement. purporting to be a written renunciation executed by *Ann Townsend* by making her mark, was offered in evidence, accompanied by proof, on the part of the appellee, who was plaintiff below, that *Ann Townsend* was an illiterate woman, and could not write; and also by the testimony of *James B. Robins*, who was sworn on the part of the appellee, that he did not see *Ann Townsend* put her mark thereto, and that his name, signed to it as a subscribing witness, was not in his handwriting, but in the handwriting of *Ezekiel Wise*, who was then his deputy, but is since dead; and that the whole writing was in the hand of *Wise*, who was in the habit, but without authority, of signing his name as a witness to other than official papers.

The reading of this obliterated paper in evidence to the jury, was objected to on the part of the appellant, (the defendant below,) but the court, before whom the cause was tried, overruled the objection, and permitted it to go to the jury; and the question presented to this court for decision is, whether it ought to have been so admitted? And it seems to us that it ought not.

When an instrument of writing is produced, which purports to have been attested by one, whose name is subscribed as a witness, the law requires it to be proved by the testimony of such subscribing witness, and will not dispense with such proof, unless it can be shown that the testimony of the subscribing witness cannot be procured, by reason of his absence, death, interest, or other disqualification, arising subsequent to the attestation; in which case evidence may be given of the handwriting of such subscribing witness; in addition to which it is also usual to prove the signature of the party. And this strictness, in relation to a subscribing witness, is observed on the ground, that the parties, by selecting him as a witness, have agreed to rely upon his testimony in relation to the execution of the instrument, and the circumstances attending it, and because he is supposed to have a knowledge of facts and circumstances which are unknown to others.

But although a subscribing witness must be called, except where it satisfactorily appears that his testimony cannot be had, yet the party is not concluded by his testimony; as, if he denies his attestation, it may be proved by other witnesses; or if he denies the due execution of the instrument, other testimony may be resorted to, to prove it, &c.

So, where it can be proved, that the name of a person appearing as a subscribing witness to an instrument of writing, was written by another, without his knowledge or assent, the party may be permitted to prove it, and in such case, he is not to be considered as an attesting witness.

In this case *James B. Robins*, whose name appears as a subscribing witness, having proved that he did not see *Ann Townsend* make her mark to the paper in question, and that his name signed to it as a witness, was not in his handwriting, it stood as an instrument without an attesting witness, and subject to be proved by any other admissible evidence. Was there any other admissible evidence then offered to prove its due execution? If there was, we have not been able to discover it embodied in the first bill of exceptions. Surely the proof by *James B. Robins*, that the whole of it was in the handwriting of *Ezekiel Wise*, his deputy, who was dead at the time of the trial, furnishes no such evidence; nor affords the slightest ground of presumption that it was executed by *Ann Townsend*; if it did, there would not be much difficulty in authenticating any forged instrument, purporting to have been executed by making a mark, after the death of him by whom it was procured to be written, or supposed to be written. This remark is not made under any impression that *Wise* intended to commit a forgery, but only on account of the general principle. Nor does it derive any aid from the circumstance that *Wise* was in the habit of improperly subscribing the name of *James B. Robins* as a witness to other than official acts, and cannot be favourably distinguished from any other instrument, not written by the party by whom it purports to have been executed, but must stand on the same footing, and be proved only in the same way.

The writing, purporting to be a certificate by the register of wills, that *Ann Townsend* did, on the 25th of November 1800, renounce the bequest to her in her husband's will, is an act not required, or authorised by law, and ought not to have been admitted in evidence to prove the execution, by her, of the instrument purporting to be her written renunciation. It stands upon no higher ground then than the mere declarations of a third person, which, except when they relate to matters that may be proved by hearsay evidence, such as pedigree, boundaries, &c. are wholly inadmissible, whether they be reduced to writing or not; and being inadmissible, this case is to be considered as if that certificate had not been used in evidence, and was not now in the record, on the authority of the case of *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 14, in which the former court of appeals reversed the decision of the general court, on the ground that a deed, which was read in evidence without objection, as a link in a chain of title to land, appeared to be defectively executed, and was not therefore legally admissible in evidence; which principle was also recognized by this court in the case of *Whittington vs. Farmers Bank of Somerset and Worcester*, 5 *Harr. & Johns.* 489, and 6 *Harr. & Johns.* 548, in relation to the admission in evidence of a protest of a promissory note. And stripped of that certificate, what is there in the record affording the semblance of evidence that *Ann Townsend* executed the cancelled instrument purporting to be her renunciation, or even laying any foundation for such a presumption? But it has with much ingenuity been contended, that the certificate in question was a part of the *res gesta*, and therefore admissible. But whether evidence be *admissible* or not, is always a question for the court to decide; and before it can be admitted, on the ground that it was a part of the *res gesta*, it must appear to the court to have been so. Now, in this case there is nothing to show that that certificate was a part of the *res gesta*, it has no direct reference to the paper objected to, nor is there any thing to show that it has any relation to it. Indeed, if that instrument, supposing it to have been ever executed, was cancelled before the certificate was written, it was not a renunciation, and the certificate could not have related to it. It does not fall within the principle that admits entries and declarations to be given in evidence as a part of the *res gesta*.

But conceding that having been admitted, it must now be treated as constituting a part of the evidence in the case, it cannot be considered as affording any the slightest proof of the due execution of the instrument attempted to be set up as the renunciation of *Ann Townsend*. Until it was lodged in the office, it could not operate as her renunciation, and was liable to be cancelled at her pleasure.

If it was in fact duly executed and lodged in the office, it was her renunciation perfectly without her control, and could not have been legally cancelled by any body. And as the certificate could not have related to that paper, if it had been before cancelled, and not lodged in the office, seeing that it purports to speak of a subsisting renunciation; so neither can it be taken to relate to it as a duly executed paper lodged in the office, without supposing it to have been obliterated by the officer or his agent, and thus supposing him to have committed an offence, for which he deserved to be punished. Not the slightest presumptive evidence, therefore, of the due execution by *Ann Townsend* of that paper, is furnished by the certificate of the register.

It is a well established rule, that if an instrument of writing be mutilated, it is *prima facie* evidence of cancellation; though proof may be admitted to show that it was done by accident, or effected by fraud, &c. In this case the instrument attempted to be set up is obliterated, and no evidence appears in the record to show that it was done by accident or fraud, or how it was effected; the condition, therefore, in which it appears, is *prima facie* evidence that it was regularly cancelled;

HERRICK & ALLEN

and it ought not, in our opinion, to have been permitted to go to the jury.

JUDGMENT REVERSED.

* * *

Rowland & Reynolds *vs.* Crawford & Marcus—June 1826.

By the act of 1788, *ch* 40, *s.* 2, all persons, or those claiming under them, claiming certain lands by virtue of any grant, warrant, lease, license or agreement, from the proprietors of *Pennsylvania*, were entitled to a patent from this state, &c. J C was entitled to an equitable right in these lands. A judgment was obtained against him by R, and the lands of J C were sold and purchased by R, who obtained a patent for them in his own name. The representatives of J C filed a bill against R, to compel him to convey the lands to them, alleging an agreement by R to obtain a patent in the name of J C and for his benefit, in consideration of being paid the amount of the judgment. R in his answer denied the agreement. Two witnesses proved the existence of an agreement to relinquish the claim and right of R to the lands, upon being paid his debt, &c. The allegation in the bill that the lands were to be patented in the name of J C, was disproved; and it did not appear how they were to be patented; but as R could only obtain a patent in his own name as a claimant under J C, the presumption was *held* to be that he had an assignment from J C. Also *held*, that although when R purchased, lands held by equitable title were not liable to be sold under a *fi. fa.* yet that R, by such purchase, had in equity a right to have them appropriated to the payment of his debt, and that a sale of them would have been decreed for that purpose. That giving to the agreement the most favourable interpretation, no conveyance from R could be decreed. That it was in terms an agreement within the statute of frauds, there being no evidence to bring it within the cases adjudged to be excepted from the operation of that statute.

Appeal from the equity side of *Cecil* County Court from a decree passed in favour of the complainants in that court, now appellees. The facts of the case sufficiently appear in the opinion delivered by this court.

The cause was argued in this court before Buchanan, Ch. J. and Martin, Stephen, Archer, and Dorsey, J.

Gale, for the Appellants, stated that the bill was filed to compel the specific execution of an alleged verbal contract in the year 1788 relative to a tract of land called *Crawford's Last Shift*. He contended, 1. That the contract stated in the bill was without consideration, and therefore void.

2. That it was subsequently rescinded and abandoned by mutual consent.

3. That it could not legally operate to the injury of a fair and *bona fide* purchaser without notice.

4. That there was no replication in the record, and that therefore the case was to be treated as if it stood solely on bill and answer; and the answer fully denied all the equity stated in the bill.

5. Supposing these grounds to fail, he then contended that the evidence was not sufficient to sustain the allegations in the bill.

6. That admitting the charges in the bill to be all proved, the interlocutory decree was erroneous in not allowing to *Rowland*, one of the defendants, his personal expenses, and also in stopping the interest at the time of old *Crawford's* death.

7. That none of the testimony, taken under the commission issued to *Porter* and *Davidson*, could be received as evidence, because the agreement was that the commission should not be joint; and it issued jointly and severally, and only one commissioner acted and made the return.

Chambers, for the Appellees.

ARCHER, J. delivered the opinion of the court. By the *second* section of the act of 1788, *ch.* 40, all persons claiming such right to the confiscated lands in *Cecil* county, known by the name of the *Nottingham Lands*, as is described in that *section*, were entitled to patents, upon conforming to the terms prescribed by that act; and all persons claiming under them, were likewise entitled to patents. It appears that *John Crawford* was a settler on these lands, and entitled by license or agreement with the then proprietor of *Pennsylvania*, to an equitable right in the lands mentioned. A judgment was obtained against him by *Rowland*, one of the respondents, and the land of *Crawford* was sold under execution, when *Rowland* became the purchaser; and about the year 1790, after the sale by the sheriff, obtained a patent therefor from the state, in his own name. The complainants filed this bill in *Cecil* county court as a court of equity, to compel *Rowland* to convey the lands thus patented, to them, alleging themselves to be the legal representatives of *John Crawford;* and also alleging an agreement on the part of *Rowland* to obtain a patent therefor, in the name of *Crawford*, and for his use and benefit, in consideration of being paid the debt, interest and costs, (his judgment against him.)

The answer positively denies the agreement; and the complainants establish by two witnesses the existence of an agreement to relinquish the claim and right of *Rowland* to the land, upon his being paid his debt, interest and costs, and the costs expended in obtaining the patent; and one of the witnesses states that the *patent was obtained in pursuance of the agreement.*

The patent having been obtained by *Rowland*, in his own name, in pursuance of the agreement, the allegation in the bill, that it was to be obtained by him in the name of *Crawford*, is disproved. In what manner this patent was obtained by the respondent, no where appears. He could, by the terms of the law, only have obtained it in his own name, as a claimant under *Crawford*, and must have had an assignment of *Crawford's* right to have come strictly and legally within the term *"claimant."* And giving to the law of 1788 a just construction, it might be fair to presume, as *Rowland* obtained the patent in his own name, that *Crawford* did assign to him his right in the land, notwithstanding the allegations of the bill, which go to negative the idea of such an assignment. But be the means what they may, by which these lands were patented in the respondent's name, we cannot presume that they were fraudulent. Fraud cannot be presumed; it must be deduced from facts and circumstances which warrant just conclusions, and legal inferences. If his obtention of the patent was founded on an assignment of *Crawford's* rights, we are bound to believe that such assignment was obtained upon a fair consideration, until the contrary is made appear.

This court conceive, that the agreement is destitute of the consideration which could give it legal efficiency. The respondent purchased these lands under an execution; and although at the time of the purchase, lands held by equitable title were not liable to a seizure and sale under a *fieri facias*, yet by such a proceeding the respondent had in equity a right to have them appropriated to the payment of his debt, and a sale of them would have been decreed for that purpose. If then this equitable right existed to such an appropriation of these lands, what consideration passed for the promise to relinquish his rights to them upon the payment of his debt? It is, manifestly, a mere gratuitous promise, which, however binding in point of morality, has not the force of legal obligation.

But giving to the agreement, in point of consideration, the most favourable interpretation which an interested mind could extract from the evidence which accompanies it, we are satisfied that no conveyance from the respondent can be decreed. It is, in terms, an agreement within the statute of frauds; and there is no testimony which will bring it within the range of those cases excepted from the operation of the statute by judicial determinations. The decree of the court below is therefore reversed, and this court will decree that the bill filed in this case shall be dismissed.

DECREE REVERSED, &C.

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CROMWELL, *et al.* *vs.* OWINGS—JUNE 1826.

Where real and personal property were taken under a *fi. fa.* and the sheriff returned the writ "laid as per schedule, and the goods and chattels replevied," and the replevin was by a third party—On motion *a venditioni exponas* was issued to the sheriff for the sale of the personal as well as the real estate.

Goods taken under an execution cannot be replevied out of the officer's hands, either by a stranger, or by the defendant in the judgment, and this whether such goods, when taken, were in the possession of the defendant or not. In either case they are considered as in *custodia legis.*

After goods are sold under an execution, and are in the hands of the purchaser, they may be replevied by the true owner, and an action for damages maintained by him against the officer.

Replevin in this state is the usual remedy to enable an owner to recover personal property from the possession of another, whether that possession be tortious or not; but to this there is an exception as to such goods as are in the custody of the law, or as have been taken by replevin from the owner by the party in possession.

At common law it is a contempt of the court issuing an execution, to replevy property taken under it.

FIERI FACIAS issued on a decree rendered in this court at June term 1823, returnable at December term 1823. The *fieri* *facias* was laid on certain tracts of land, and goods and chattels; and the goods and chattels were replevied and taken out of the possession of the sheriff, under a writ of replevin issued out of *Baltimore* county court, at the instance of *Jacob Holderman*, directed to some one of the coroners of the county. The sheriff returned the writ of *fieri facias* laid as per schedule, and the goods and chattels replevied. *Motion* on the part of the plaintiffs for a writ of *venditioni exponas* for the sale as well of the personal as of the real estate.

This motion was argued at June term last before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Taney and *Mayer*, for the motion, contended, that goods taken in execution were in the custody of the law, and could not be replevied out of the hands of the sheriff who seized them. They cited *Pearson vs. Roberts*, *Willes' Rep.* 672, (*note* b.) *Ladd vs. North*, 2 *Mass. Rep.* 514. *Flagg vs. Tyler*, 3 *Mass. Rep.* 304. *Thompson vs. Button*, 14 *Johns. Rep.* 86. *Gilb. on Ex'ns.* 22. 1 *Sellon's Pr.* 528. *Beatty vs. Chapline*, 2 *Harr. & Johns.* 7. *Eaton vs. Southy*, *Willes' Rep.* 136. *Alexander vs. Mahon*, 11 *Johns. Rep.* 185, 186. *Palgrave vs. Windham*, 1 *Stra.* 212, 214. *Buxton vs. Home*, 1 *Shower's Rep.* 174. *Farr vs. Newman*, 4 *T. R.* 640, 651. 4 *Hall's L. J.* 484. *Turner vs. Fendall*, 1 *Cranch*, 117. *Ball vs. Ryers*, 3 *Caine's Rep.* 84. *Sturtevant vs. Ballard*, 9 *Johns. Rep.* 337. *Ilsley vs. Stubbs*, 5 *Mass. Rep.* 280; and *Gardner vs. Campbell*, 15 *Johns. Rep.* 401.

R. Johnson, against the motion, cited 6 *Com. Dig.* tit. *Replevin*, (A) 224. *Pangburn vs. Partridge*, 7 *Johns. Rep.* 140. *Clark vs. Skinner*, 20 *Johns. Rep.* 465, and 6 *Bac. Ab.* tit. *Replevin & Avowry*, (C) 56.

Curia adv. vult.

BUCHANAN, Ch. J. at this term, delivered the opinion of the court. The main question directly presented by this motion is, whether goods taken by a sheriff in virtue of a writ of *fieri facias*, out of the possession of the defendant in the execution, can be replevied by a stranger to the judgment and execution. It is a question of considerable importance to the citizens of the state, and now for the first time brought before this court for consideration, and it assumes a character the more imposing, from the circumstance that different opinions are understood to have been entertained by professional gentlemen, and different decisions made in some of the judicial districts.

It is conceded, and indeed it seems to have been too long and too well settled to admit of doubt, that goods taken by the proper officer, under a writ of *fieri facias*, out of the possession of the defendant in execution, cannot be replevied from the officer by such original defendant. And why not? Because, in the language of all the most approved writers on that branch of the law, and denied by none, goods taken in execution are in the custody of the law. So it is laid down in *Co. Litt.* 47, *a*, and in other books, that goods taken in execution, and goods distrained damage feasant, being in the custody and under the protection of the law, cannot be taken for rent in arrear. And it would be strange if it were otherwise, for it would be absurd and repugnant *ex vi termini* to say, that goods in the custody of the law, could *legally* be taken out of the custody of the law.

The instances last put of the protection given by the law to that, which is in its custody, are stated, and serve to show its consistency, and that the protection extended to goods in its custody, is not a protection against the writ of replevin alone, of goods taken in execution, but a shield thrown over whatever it takes into its custody. And the rule that goods taken in execution are held to be in the custody of the law, is in strict accordance with sound policy and good sense, with which the principles of the law, when well understood, and properly applied, are seldom if ever found to be at variance.

If a different rule prevailed, and debtors were permitted to defeat the ends of the law, by replevying their goods from the proper officer whenever they should be taken in execution, it would be useless to institute suits, and prosecute them to final judgment. But it is supposed that a distinction may be taken between a debtor, and a stranger, whose goods found in the possession of such debtor are taken in execution; on the general ground, that replevin will lie by any rightful owner, for chattels wrongfully taken by another. And in this case it is said, that as the sheriff was only authorised to take the property of the debtor, against whom the judgment was rendered, he was a wrong-doer in taking the property of the plaintiff in the replevin, and that the action was properly conceived.

It is a general principle, that the owner of chattels may replevy them from any person who has unlawful possession of them; but there are exceptions to this general rule, such as where they are in the custody of the law, or have been taken from him by replevin by the party in possession.

In 6 *Com. Dig.* tit. *Replevin,* (A) 224, it is said, that "replevin lies for all goods and chattels unlawfully taken;" which is thus qualified in the next page 225, (D)—"But a replevin does not lie for goods taken in execution."

In this state the action of replevin has nearly taken place of trespass and trover, and is the usual, and almost universal remedy resorted to by those claiming a right to goods in the possession of another, when within the reach of the process of the court, whether tortiously taken or not. But, as it will not lie by a debtor against an officer who has taken them under an execution out of his possession—such an effort to regain the possession of goods taken in execution, being deemed at common law a contempt of the jurisdiction of the court issuing the execution, on the ground that goods so taken are held to be in the custody of the law, it would, for the same reason, be a contempt in any body else.

As a general principle, goods found upon the premises are liable to be taken for rent, but subject to the exception, that if they be under execution they are in the custody of the law, and cannot be distrained. It is true that the property in the goods is not in such case in the landlord, but his right in law to distrain is as complete as that of the owner of goods to an action of replevin, against him who withholds from him the possession. He is no party to the judgment and execution, and has nothing to do with either, but as to them, stands as a mere stranger, seeking to enforce his rights, but restrained from disturbing the *possession* of the officer, by the protecting arm of the law. It is not the officer that the law protects in doing wrong, but the possession only of the chattels, in order to effect its own ends, the purpose for which the execution issued, and therefore though it will not grant process to take from an officer, goods which he has taken by its own process regularly issued, which would be an incongruity; yet if goods are wrongfully seized by virtue of legal process, the party injured is not deprived of remedy by the interference of the law, but has his redress against the officer for such wrongful taking, and may proceed by writ of replevin to recover the possession of the property itself, after sale, from the purchaser, for then it is out of the custody of the law, and in the hands of a private person.

The application of the rule, "that goods taken in execution cannot be replevied," to the case of a stranger, whose property has been taken on an execution against another person, may sometimes be attended with individual inconvenience. Particular descriptions of property are often valued by the owner at more than their intrinsic worth, and sometimes beyond the amount of any damages to be recovered in an action of trespass or trover against a wrongful taker; and it must always be vexatious to any one to have his property wrongfully taken, and to be driven to an action of trespass or trover for redress, instead of being restored to the possession by the writ of replevin.

But reasoning *ab inconvenienti,* the weight of the argument is on the other side.

A defendant who would, if he could, defeat the ends of justice, by replevying his property himself when taken in execution, would, if the law permitted it, procure another to do it for him, under the pretext that it was his property wrongfully taken, and not the property of the debtor, and so *ad infinitum*; which, to borrow a strong expression, "would be moving in a circle," and a creditor might never arrive at the fruits of his judgment, and thus the very object of the law be disappointed; which would be against public policy, to which individual convenience must sometimes yield. But that inconvenience is comparatively small; it does not very often happen, that the goods of a stranger are taken on an execution issued against another; perhaps never when the fact is known to the officer, and very seldom in doubtful cases, without an indemnity from the plaintiff suing out the execution, which he is not always prepared or willing to give. And whenever the goods of a stranger are wantonly taken, or after due notice being given that they are his property, the party injured, if he chooses not to wait and replevy from the purchaser after sale, may always attain ample redress, in exemplary damages, in an action of trespass or of trover, at the hands of a jury—a tribunal, that is always found ready to vindicate the rights of the individual against the lawless oppressor. And in cases of mere mistake, without any intention to do wrong, less than the full value of the goods taken will seldom be recovered. But if the goods were permitted to be taken from the hands of the officer by a writ of replevin, the rights of a creditor might always be defeated, by a mere stranger, having no right, since it could only be determined at the trial, and after the mischief was done, and the very object of the judgment disappointed, to whom the property belonged. And thus the law, by allowing process to defeat its own ends, would virtually close the door of justice against creditors seeking to enforce their judgments. The principle, that the goods of a stranger taken in execution out of the possession of the defendant, cannot be replevied, is recognized in *Thompson vs. Button*, 14 *Johns. Rep.* 86, and *Clark vs. Skinner*, 20 *Johns. Rep.* 465; and so far as this case is concerned, we might stop here.

But the question, whether the goods of a stranger taken out of his possession, on an execution against another person, can be replevied out of the hands of the officer, having also been discussed, and being a question in which the public is materially concerned, and therefore proper to be settled, we avail ourselves of this occasion to express our opinions upon the subject. In *Thompson vs. Button*, and *Clark vs. Skinner*, it is held that in such case a replevin will lie.

But we cannot perceive any sufficient ground for the distinction. In either case the taking the property of a stranger is wrongful as to him, and as much so in one case as in the other. And if replevin will lie by a stranger, whose property is taken in execution out of his possession, on the principle that it is wrongfully taken, it would seem to follow that the same writ will equally lie for an equally wrongful taking of the property of a stranger out of the possession of a defendant. But it does not depend upon the question, whether the property was wrongfully taken or not, which can only be determined at the trial, but whether it was in the custody of the law or not; and that once established, the possession cannot be disturbed, but the party injured is left to seek his remedy by an action of trespass or trover, or to wait until the goods are sold, and then to regain his possession by a writ of replevin against the purchaser, in whose hands they cease to be in the custody of the law. Upon that principle we think, that in no case whatsoever will replevin lie against an officer for goods taken in execution under lawful process; and so is the case of *Ilsley and others vs. Stubbs, 5 Mass. Rep.* 280. If it were otherwise, it would always be in the power of a defendant to evade the law, and defeat the ends of justice, by placing his property in the hands of a friend, and causing it, when taken in execution, to be replevied from the hands of the officer by such friend; and thus the mischief would be just as great, as to permit a defendant to replevy property taken in execution out of his own possession.

MOTION SUSTAINED, AND VENDITIONI EXPONAS ORDERED.

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EDELEN *vs.* HARDEY'S Lessee.—June, 1826.

If evidence is given in the court below, by consent of parties, its legality cannot be questioned in the appellate court.

In an ejectment where the defendant's title to the land sued for, and his only defence was under the supposed will of a former owner, and it appeared that there had been a former ejectment against the defendant, in which the same question was in issue, and in which said supposed will was adjudged to be invalid, and the case on that ground decided against him—*Held,* that he was not thereby concluded from going into evidence to establish the legality of the will.

Where it appeared that the will, under which the defendant claimed title, was signed by the testator, in the presence of the witnesses, but that they, at his request, took it into an adjoining room to attest it, between which and the testator's room there was a plank partition, and after attesting it, it was carried to the testator, and he informed of the attestation, and approved of it—*Held,* that *prima facie,* the will was not legally executed.

It is not essential that a testator should actually see the witnesses to his will sign it, but it is essential that he should be in a situation, whence he could do so, if he desired it.

Appeal from *Prince George's* County Court. Ejectment for an undivided third part of a tract of land called *What You Please.* The defendant, (the appellant,) took general defence, and issue was joined on the plea of not guilty.

1. The plaintiff at the trial read in evidence, with the consent of the defendant, and under an agreement for that purpose entered into between the parties, the certificates of the clerk of the circuit court of the District of *Columbia* for *Washington* county, given on the 1st ot September 1820, not under the seal of his office, stating "that the papers filed in the ejectment suit of *Sarah Coombs, Martenannon Jenkins* and *Priscilla Hardey's* lessee, against *Francis Jenkins,* which was tried by a jury at June term 1812, in the circuit court of the District of *Columbia* for the county aforesaid, were destroyed by the enemy in the capitol in August 1814; that there is no record of the said suit, and nothing remaining in his office in relation thereto, except the docket entries, and the entry in the minute book, which can be found, after a diligent search." The said docket entries of June term 1811, shew, that an ejectment was brought—a declaration filed—lease, entry and ouster confessed—not guilty pleaded—issue joined.—That a jury was sworn, and a special verdict found; and that on the special verdict a judgment was rendered for the plaintiff at December term 1812. The entries taken from the minute books made on the trial of said action, state the names of the judges of the court who were present, and of the jurors who were sworn to try the issue, amongst whom was *John J. Stull.* That a bill of exceptions was taken by the plaintiff, and that the jury found a special verdict. The plaintiff also read in evidence, with the consent of the defendant, under the agreement aforesaid, the certificate of the Honourable *William Cranch,* chief judge of the said circuit court, giving a copy of the whole of his notes taken on the trial of the above mentioned cause, stating it to have been an action of ejectment for lot No. 3, in square No. —, in the city of *Washington*; that "plaintiffs are heirs at law of *Thomas Jenkins,* who died seized. Defendant is his devisee. The will was executed by the testator in the presence of the subscribing witnesses, when he requested them to go into the

other room to subscribe their names, as he wished to be alone for a few minutes. They did so. Mr. *Matthews* returned to his room after they had subscribed, and read the will again to the testator, and told him the witnesses had subscribed. He replied *it is well*, and seemed satisfied. The rooms were separated by a wooden partition, &c. &c. See bill of exceptions." He then gives a sketch of the arguments of the counsel, the defendants' counsel contending, "that the copy of the will and probat should go the jury as evidence without any further proof;" and the plaintiff's counsel contending, "that it was not a bar to the descent under the circumstances stated in the bill of exceptions, it not having been subscribed by the witnesses in the presence of the testator. The court refused to instruct the jury that it was not a bar; but told them that it was not a bar to the plaintiff's right of recovery, unless they should be satisfied by the evidence that it was subscribed by the witnesses in the *presence* of the testator, leaving the whole evidence to the consideration of the jury." The plaintiff then produced as a witness *John J. Stull*, one of the jurors named as before stated in the extract from the minute book, who gave evidence that he was one of the jurors who tried the said cause, and that he remembered the only fact disputed by the parties before the jury was, whether or not the witnesses to the will subscribed their names thereto in the presence of the testator. The evidence was, that the testator, then ill, signed the will in the presence of the witnesses, and then, before they attested it, desired them to leave the room for a short time, which they did, and went into an adjoining room, through a passage, separated by a plank partition from the room in which the testator lay; that there was no direct communication between these rooms, nor could the testator see them sign the will in that room, from the room in which he lay; that they there signed the will, which was then, by the Reverend *William Matthews*, taken into him; that a special verdict was found by the jury, stating the above facts, as nearly as the witness can recollect. Witness recollects perfectly, that the opinion of the jury was, that the testator, at the time the witnesses subscribed the will, could not see them. On the preceding statement the plaintiff prayed the opinion of the court, and their instruction to the jury, that the defendant was precluded from going into evidence to prove the execution of the will. This opinion the Court, [*Johnson*, Ch. J. and *Key*, A. J.] refused to give; but were of opinion, and so directed the jury, that the same was *prima facie* evidence that the will was not legally executed. The defendant excepted.

2. The defendant then produced a copy of the said will and probat, duly certified, which is as follows: "November 6th, one thousand eight hundred and seven. In the name of God, Amen. I, *Thomas Jenkins*, of *Washington* county, of sound disposing mind, but weak in body, do make and ordain this my last will and testament, revoking all heretofore by me made. I give to the Reverend *Francis Neale*, of *George Town*, two hundred dollars, which I charge my brother to pay him out of the property I leave him. I give freedom to my white slave *Charity Hutchins*. All the rest of my property, both landed and personal, lying in *Prince-George's* county, *Maryland*, and the city of *Washington* and *George Town*, I give to my brother *Francis Jenkins*, and his heirs. I also charge my said brother *Francis Jenkins*, to have my body decently interred. And I appoint my brother, *Francis Jenkins*, to whom I have left all my property, both real and personal, with the above mentioned exceptions, my sole executor to see this my will carried into effect.

his
Thomas X Jenkins, (L. S.)
mark

Signed, sealed and delivered, in the presence of
Johnnaz Mountz,
Jacob Miller,
Hezkh. Berry.

N. B. I give freedom to *Charity Hutchinson*, on consideration that she pay to my brother *Francis* three dollars per month for the term of three years; also I give freedom to my slave *Rachel*.

District of *Columbia*, *Washington* county, viz. On the 23d day of November, in the year 1807, came *John Mountz*, *Jacob Miller* and *Hezekiah Berry*, the three subscribing witnesses to the annexed and aforegoing last will and testament of *Thomas Jenkins*, late of *Washington* county, deceased, and made oath that they saw *Thomas Jenkins*, the said testator, put his mark to the said will, and the reverend *William Matthews* sign his name for him at his request and in his presence, the said *Jenkins* sitting in his bed, and having no convenience there for writing; that they heard the said testator publish, pronounce and declare, the aforegoing and annexed, to be his last will and testament. That at the time of so doing the testator was, to the best of their apprehension, of sound and disposing mind, memory and understanding. That they, the deponents, severally subscribed their names as witnesses to the same, at the request of the said testator, and in presence of each other. After the testator had set his mark to the will, Mr. *Matthews* requested them to sign it. The testator replied, "do gentlemen, go out to the next room and sign," &c. They accordingly went into the next room, and there signed their names, but the will was immediately taken back to the testator. And the said *Hezekiah Berry* deposeth, that he heard the reverend Mr. *Matthews* reading the same to him. They further depose, that the *N. B.* on the back was written by the reverend Mr. *Matthews*, before the testator put his name to this will, and before they attested. The reverend *William Matthews* being duly sworn saith, that after the will had been signed as aforesaid, he immediately carried the same back to the testator, and read it to him, informing him that the persons above named had witnessed it, shewing him at the same time their handwriting, at which the deceased nodded his head by way of assent, appeared quite satisfied, and he thinks the testator added "well," or "very well." The defendant then upon this evidence, and also that stated in the first exception, prayed the court to instruct the jury, that if from the evidence the jury are of opinion that the situation of the witnesses and the testator, at the time of the attestation, was such that the testator might have seen the witnesses subscribe as such, the execution of the will was proper, although the testator did not actually see the witnesses subscribe their names; otherwise not. This instruction the court gave. The plaintiff excepted.

3. The defendant then upon all the evidence, prayed the court to instruct the jury, that if they believed from such evidence, that

after the witnesses to the will had attested and subscribed it in the adjoining room, at the request of the testator, that the will was then carried back to the testator and read to him, and he informed that the persons named as witnesses had witnessed, and was shewn at the same time their handwriting, at which he nodded his head by way of assent, and appeared quite satisfied, and the witness (thinks) added "well" or "very well," that then they must find a verdict for the defendant; or that this evidence furnished presumptive proof of a compliance with the requisites of the statute, November 1798, chapter 101. This instruction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at June term last before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and ARCHER, J.

Magruder, for the Appellant, contended—1. Upon the *first* bill of exceptions—that the court below erred in saying that the testimony was *prima facie* evidence that the will was not legally executed; and also insisted that the testimony of *John J. Stull* was not admissible. He cited *Bowie* vs. *O'Neale et al. Lessee*, 5 *Harr. & Johns.* 226.

2. Upon the *third* bill of exceptions he contended—that the testimony therein stated did furnish presumptive evidence of a compliance with the requisites of the statute.

F. S. Key, for the Appellee, referred to *Wood vs. Davis*, 7 *Cranch*, 271, as to the conclusiveness of a verdict and judgment.

Curia adv. vult.

STEPHEN, J. at this term delivered the opinion of the court. This action of ejectment was instituted in the court below for an undivided third part of a tract of land called *What you Please.* Defence was taken upon title. The lessor of the plaintiff claiming as heir at law of *Thomas Jenkins*, and the defendant under an instrument of writing alleged to be his last will and testament; and the sole question which appears to have arisen in the court below, related to the due execution of said will, according to the formalities prescribed by the statute of frauds and perjuries. Upon this point *three* bills of exception appear to have been taken in the court below, only the *first* and *third* of which are before this court, for their review and adjudication, upon the appeal prosecuted by the appellant. The opinion contained in the *second* bill of exceptions is not appealed from, and is only before this court by the agreement of the parties, as furnishing the testimony upon which the opinion of the court was prayed and given in the *third* bill of exceptions. The whole of the testimony which went to the jury upon the trial of this case, was admitted by the consent of the parties, and such consent obviates any objection which might otherwise have been made to it as being exceptionable in point of law. This court are of opinion, that the court below did right in refusing the prayer of the plaintiff, that the defendant was precluded from giving evidence to prove the due execution of the will. The conclusion of law deduced by the court from the facts so given in evidence, that the same were *prima facie* evidence that the will was not legally executed, is believed by this court to be correct.

It is the opinion of this court, that there is no error in the opinion of the court below expressed in the *third* bill of exceptions, because the evidence, so far from warranting a presumption that the formalities of the law had been complied with, in reference to the execution of last wills and testaments, furnished very strong grounds from which a contrary inference might be drawn. It is true it is not essential that a testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation which would give him the capacity of doing so if he should desire it. *Russell & Lux vs. Falls*, 3 *Harr. & M'Hen.* 457.

JUDGMENT AFFIRMED.

◆

SHAFER *vs.* SMITH.—June, 1826.

Trespass *Q. C. F.* for breaking the plaintiff's close, and erecting thereon a wall, by which the plaintiff was prevented from using the water in her well. The facts were, that the well did not belong to the plaintiff, but to the defendant, and was on the land of the latter, but that the plaintiff had a right to use the water in it.—*Held*, that the action could not be sustained, but that the plaintiff's remedy for being deprived the use of the water was *an action on the case.*

In an action of trespass, the circumstances which accompany and give character to the trespass, may be given in evidence to increase the damages.

And in an action of trespass to the person of the plaintiff, other trespasses to his person, or to that of his wife, children or servants, if committed at the time of the principal trespass, (being laid in the declaration,) may for like purpose be given in evidence; as may also the defendant's conduct and language at the same time as proving his malice. But in no case can damages be recovered in one action for an independent substantive injury for which another form of action is prescribed.

The declaration alleging the well to be the plaintiff's, and the evidence shewing it to be the defendant's, the variance was held to be fatal.

APPEAL from *Frederick* County Court from a judgment rendered in favour of the plaintiff in that court, (the now appellee.)

The case, a statement of which is given in the opinion delivered by this court, was argued before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Palmer, for the Appellant. 1. To shew that the action could not be sustained, he cited 3 *Starkie's Evid.* 139, 150. 1 *Chitty's Plead.* 142. 2 *Chitty's Plead.* 300 to 304. 2. Where there is a substantive change in the declaration, evidence cannot be given to enhance the damages. *Bracegirdle vs. Orford*, 2 *Maule & Selw.* 77. *Bull. N. P.* 88, 89. *Russell vs. Corne*, *Holt's Rep.* 699. *Newman vs. Smith*, 2 *Salk.* 652. 3 *Starkie's Evid.* 1451, 1452.

No Counsel appeared for the Appellee.

MARTIN, J. delivered the opinion of the court. This was an action of trespass for breaking the close of the plaintiff, (the appellee,) and erecting thereon a wall, by which she was prevented from using the water in *her* well. The defendant pleaded not guilty, and at the trial offered evidence, to prove the well did not belong to the plaintiff; that it was on the land of the defendant, and her property, and that the plaintiff had only a right to use the water in it; and upon this evidence moved the court to instruct the jury, that if they believed the well was the property of the defendant, the plaintiff could not in this action recover damages for being deprived of the use of the water, although she had a right to take water from that well. This direction the court below refused to give.

If the judgment of the court below be sustained in this case, it would enable a party to recover damages, not only in opposition to the case as stated in the declaration, but also for an injury done to an incorporeal right, in an action of trespass *quare clausum fregit.*

The questions presented to the court by this statement, do not require an examination of those cases, where matter is introduced into the declaration in aggravation of the damages for the trespass committed. The objection was not that the testimony was improper to increase the damages, but that the jury could not assess damages for this independent injury.

There can be no doubt the plaintiff may give in evidence, to increase the damages, the circumstances which accompany and give character to the trespass; and it appears now to be settled law, that other *trespasses* to the person of the plaintiff, his wife, children or servants, if committed at the time of the principal trespass, (being laid in the declaration,) may be given in aggravation of damages. So also the conduct and language of the defendant, at the time the trespass was committed, as evidence of his malice. But in all those cases the evidence was received to increase the damage of the principal trespass; and it is believed no case can be found, where the court, in an action of trespass, has directed damages to be given for an independent substantive injury, requiring a different form of action. If the property of the well in this case was in the defendant, and the plaintiff had the right to use the water in it, it was an incorporeal right, and if she was deprived of that right, she could obtain redress *only* in an action on the case. To permit a plaintiff to complain of this injury, and recover damages for it, in an action of trespass *quare clausum fregit,* would be to confound all the forms of actions, which on principles of law have heretofore been kept separate and distinct.

The declaration states this to be the well of the plaintiff; the evidence proves it to belong to the defendant—this is a fatal variance. The *allegata* and *probata* do not agree. The plaintiff, on an allegation that she was prevented from using the water in her *own* well, could not sustain the action by evidence, that she had a right to use the water in the well of *another* person.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

◆

GRIFFITH *vs.* JARRETT.—June, 1826.

J and G submitted by parol all matters in dispute between them to arbitration. Under this submission the arbitrators made an award, stating "that they had taken into consideration all matters which were laid before them in dispute between the parties, and they do hereby award and determine that there is due from G to J, $367," &c. On the back of the award was this endorsement, without date, signed by the arbitrators: "Note. The arbitrators wish it to be understood by the parties, that they have taken no notice whatever of the claim made by G for credit for dividends said to be received by J for bank and insurance stocks." In an action of *assumpsit* on this award, it was in evidence, that the subject of the dividends alluded to in this endorsement, was one of the matters in dispute, and one of the subjects of the reference—*Held*, that the plaintiff was not entitled to recover. That as the endorsement on the award was without date, it must be inferred to have been made at the time the award was, and to have been intended to form a part of it. That therefore the award was defective in two essential particulars—1. In its being only of parcel of the submission. 2. In its not being final on the subject of the submission.—*Held* also, that it was competent in this action for the defendant to give in evidence that the plaintiff was indebted to him for dividends received on the said bank and insurance stocks.

APPEAL from *Harford* County Court. This was an action of *assumpsit*, founded on an award of arbitrators selected by the parties. The defendant below, (now appellant) pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiff, (the Appellee) gave in evidence the following award, dated the 3d of July, 1822, and signed by *John Archer* and two others. "The undersigned, acting as arbitrators in the settlement of accounts between *Abraham Jarrett* and *Edward Griffith*, state that they have taken into consideration all matters which were laid before them, in dispute between the parties, and they do hereby award and determine, that there is due from the said *Griffith* to the said *Jarrett* the sum of three hundred and sixty-seven dollars and eighty-five cents, bearing interest from the 15th day of February, 1817." Upon the back of this writing was this indorsement: "*Note.* The arbitrators wish it to

be understood by the parties, that they have taken no notice whatever of the claim made by Mr. *Griffith* for credit for dividends said to be rec'd. by Mr. *Jarrett*, for bank and insurance stocks." This was also signed by the arbitrators. The plaintiff also gave in evidence the following letter written to him by the defendant, and dated the 8th of July, 1822, viz. "In answer to yours of this morning, I have to state, that I received the award on Saturday last from Doctr. *Archer*, and wrote to him on the subject, which letter I requested him to shew to you; it was to inform you that the amt. of the award would be paid on demand, whenever I was released from my securityship to the guardian of *Herman Stump*. I shall be at *Bush* tomorrow, and the money will be paid then, if the release has been made." The defendant then gave in evidence by Doctor *John Archer*, one of the arbitrators, that the plaintiff and defendant had submitted to the arbitrators who made the award above-mentioned, all matters in difference between them; that one of the matters in difference was the amount of dividends which the defendant alleged had been received on bank stock, from the banks in *Baltimore*, by the plaintiff, on account of *Hannah Stump*, who was afterwards the wife of the defendant, which the defendant insisted should be credited by the arbitrators in the award upon the plaintiff's account, which consisted of various items furnished the said *Hannah*, by the plaintiff, before her marriage with the defendant, and of no other items whatever; that the dividends would have exceeded the amount of the said award; that the arbitrators rejected the matter of the dividends, because no evidence was produced before the arbitrators; but referred the parties to the bank books in *Baltimore*, to ascertain the same, where the evidence was to be procured. And the defendant further gave evidence, in explanation of the said letter, that he, together with several others, had given security in the orphans' court for *Elizabeth Jarrett*, the wife of the plaintiff, as guardian to *William H. Stump*; and he offered in evidence the bond so by them entered into, dated the 11th of March, 1817. He further gave in evidence, that the said guardian was, on the 27th of August 1822, in arrear to the estate of the said *William H. Stump*, to the amount of $9,680 07; and that he the defendant, as one of the said securities, was sued for the same. The defendant then prayed the court to instruct the jury, upon all the evidence that the plaintiff was not entitled to recover; which direction the Court [*Hanson* and *Ward*, A. J.] refused to give. The defendant excepted.

2. The defendant then further offered in evidence, that the plaintiff had at various times before the marriage of *Hannah Stump*, which took place in February 1817, received dividends upon the stock in the banks and insurance companies of *Baltimore*, to the amount of the said award; and that those moneys had never been accounted for by the plaintiff; but this evidence the court rejected. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last term before BUCHANAN, Ch. J. and MARTIN, and STEPHEN, J.

Mitchell, for the Appellant, contended, that the award was null and void, as it awarded on part only of the matters submitted to arbitration. That it was not a final award of all differences, and that it was not mutual. He referred to *Kyd on Awards*, 171, 208, 215, 216, 218, 219, 220; and 1 *Com. Dig.* 185.

Magruder and *R. Johnson*, for the Appellee, cited *Chapman vs. M'Cann*, decided in this court at June term 1824. (MS.)

Curia adv. vult.

STEPHEN, J. at this term delivered the opinion of the court. The suit in the court below was founded upon an award made by certain referees, in virtue of a submission by parol of all matters in difference between the plaintiff and defendant. In the course of the trial the defendant proved, by one of the arbitrators, that one of the matters in controversy between the parties, was the amount of certain dividends, alleged by the defendant to have been received by the plaintiff on bank stock in certain banks in *Baltimore*, an account of *Hannah Stump*, while sole, but who afterwards intermarried with the defendant, which he insisted should be credited to him in the award upon the plaintiff's account, which consisted of sundry items furnished the said *Hannah*, by the said *Jarrett*, before her marriage with the defendant, and of no other items whatever, and that the dividends would have exceeded the amount of the said award; that the arbitrators rejected the matter of the dividends, because no evidence was produced before them, but referred the parties to the bank books in *Baltimore*, to ascertain the same, where the evidence was to be procured. On the back of the award was the following note or memorandum: "*Note.* The arbitrators wish it be understood by the parties, that they have taken no notice whatever of the claim made by Mr. *Griffith* for credit for dividends said to be received by Mr. *Jarrett* for bank and insurance stocks." This endorsement has no date, and is presumed to have been written at the same time the award was made. It is signed by all the referees who signed the award, and was no doubt intended to be a part thereof; and no reason is perceived in point of law why it should not have that effect. Ascribing to it this faculty of explaining the scope and operation of the award, it manifestly results, as a necessary legal consequence, that the award is not good or binding upon the parties. It is deficient in two essential attributes of a valid award. It must not be of parcel only of the things submitted. *Kyd on Awards*, 171. And it must be final, so as to prevent any future litigation on the subject of the submission. *Ibid* 208.

This court are of opinion, that the court below erred in their opinions expressed in both bills of exceptions.

JUDGMENT REVERSED.

JAMES VS. LAWRENCE'S Adm'r.—June, 1826.

In debt on an award, the declaration stated, that certain differences having arisen between the plaintiff and E L, formerly administratrix of R L, deceased, the plaintiff and E L, by consent and by the order of the orphans court of, &c. referred the disputed claim of the plaintiff against the estate of R L, to A, B and C, who were on the same day approved by said orphans court for said purpose, and that the plaintiff and E L did, with the consent of the said court, agree to abide by the award, &c. of said arbitrators; that the arbitrators awarded in writing, under such reference, that E L should pay the plaintiff the sum of £452, with interest, and costs of suit thereon, as recovered from the said plaintiff by one P K, in chancery, and that of this award the said parties had notice. That E L afterwards intermarried with one R B, and was duly removed from said administration, and O L the defendant appointed administrator of R L, in her place, and took upon himself such administration: yet that E L had not, nor the defendant, paid the plaintiff the said sum of £452, in the award mentioned, although E L, while administratrix, and the defendant since his appointment as administrator, had been requested to pay, &c. whereby an action had accrued to the plaintiff to demand of the defendant the said sum of £452. On demurrer to this declaration and joinder in demurrer, the demurrer was ruled good; and *Held*, that as the award was for certain costs and interest, as well as the said sum of £452, it was not competent for the plaintiff to sue for the latter sum only.

Held also, that as the declaration stated the award to be that E L should pay the amount of the award in her individual, and not in her character as administratrix, it was not competent to charge that amount on the defendant as administrator of R L And also, that if the declaration had alleged the award to be that E L, should as administratrix pay, &c. and if, in this form of action a subsequent administrator of R L, might be liable as administrator to pay such debt, the declaration would not entitle the plaintiff to recover, because the breach laid in it was *that neither E L, nor O L. paid, whereby the plaintiff had a right to demand the debt of O L,* which was charging him not as administrator, but individually; and a judgment against him would be *de bonis propriis,* which could not be admitted.

APPEAL from *Frederick* County Court. Debt on an award made by arbitrators appointed in pursuance of an order of the orphans court. To the declaration, (which is set out by the judge who delivered the opinion of this court,) there was a general demurrer, which the county court sustained; and the plaintiff, (now appellant,) appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER, and DORSEY, J.

Palmer, for the Appellant. 1. Is the award a good and valid award as it appears in the pleadings in the cause? 2. If it is a good award, can an action of debt be sustained upon it against the defendant as administrator of *Richard Lawrence*, deceased.

1. The reference was authorised by the act of 1798, *ch.* 101, *sub ch.* 8, *s.* 12. An award may be good in part, and bad in part. *Cromwell, et al. vs. Owings,* 6 *Harr. & Johns.*

10. It need not declare that upon payment of the money awarded, a release should be executed. *Kyd on Awards,* 220 to 226. *Weed vs. Ellis,* 3 *Caine's Rep.* 253. Certainty in the award to a common intent is sufficient. *Kyd on Awards,* 244. *Tomkins vs. Webb,* 1 *Roll. Ab.* tit. *Arbitration,* (M 6.) If the declaration alleges what is substantially correct, it is sufficient; and the omission to declare for the costs in the court of chancery, as awarded, does not vitiate it. 2 *Chitty's Plead.* 145, (*note.*) *Hodsden vs. Harridge,* 2 *Saund.* 62, (*note* 5.)

2. The award is as final and conclusive as a judgment in a court of law, or a release; and the original cause of action is merged in the award. 3 *Blk. Com.* 16. An action of debt will lie on an award against an administrator; and if he submits to arbitration, it is an admission of assets. *Worthington vs. Barlow,* 7 *T. R.* 449. 2 *Tidd's Pr.* 759. *Kyd on Awards,* 40. The present administrator stands in the situation of the former administratrix; and if the action could be maintained against the former administratrix, it can be against the present administrator.

Taney and *Gill,* for the Appellee. This is an attempt to charge the appellee, as administrator *de bonis non,* on an award made under a submission by the former administratrix.

1. Nothing is said in the declaration as to the *interest* and the *costs* awarded. This is a fatal variance between the contract declared upon, and that exhibited.

2. The award is not final. It is not a final ascertainment of the sum due. It is not said in the award from what period of time the interest is to be computed, nor does it state the amount of the costs of the suit it refers to.

3. If the award is final, yet the declaration does not treat it as a final award. There is no averment what were the costs of the suit referred to.

4. Can an action of debt be maintained on this award? The action on the case is intended to give a remedy where the old form of action gave none.

5. An action on an award can only be maintained between the parties to it, or their representatives.

On the *last point*, they cited *Dilley vs. Polhill*, 2 *Stra.* 923. *Kyd on Awards*, 278. *Childs vs. Monins*, 6 *Serg. & Low.* 200. *Worthington vs. Barlow*, 7 *T. R.* 449. 3 *Blk. Com.* 16; and *Priddy vs. Hendrey*, 8 *Serg. & Low.* 182. The declaration does not state a debt due from the deceased; that the intestate was indebted as the foundation of the liability of the administrator to pay. To maintain an action against an administrator, a cause of action against the deceased must be alleged. *Carnan vs. Turner*, 6 *Harr. & Johns.* 67. 1 *Chitty's Plead.* 92, 104. Here the writ and declaration is against the appellee as administrator, whereas he is administrator, *de bonis non. Birks vs. Trippet*, 1 *Saund.* 32, (*note* 2.) A submission to arbitration by an administrator is not an admission of assets. *Kyd on Awards*, 40; and *Pearson vs. Henry*, 5 *T. R.* 6.

Mitchell, in reply, cited 5 *Com. Dig.* tit. *Pleader*, 576, 587, 589.

DORSEY, J. delivered the opinion of the court. *Joseph James*, the appellant, sued out of *Frederick* county court against *Otho Lawrence*, administrator of *Richard Lawrence*, a writ of *capias ad respondendum* in the usual form. And on his appearance to the writ the plaintiff declared against him, as follows: "Whereas certain differences having arisen between the said *Joseph* and a certain *Elizabeth Lawrence*, formerly administratrix of *Richard Lawrence*, deceased, the said *Joseph* and *Elizabeth* heretofore, to wit, on the twenty-first day of May, eighteen hundred and eleven, at the county aforesaid, by mutual consent, and by the order of the orphans court of said county, referred the disputed claim of the said *Joseph*, against the estate of the said *Richard Lawrence*, to a certain *Abraham Crapster*, *Abraham Jones* and *John Campbell*, who were, on the day and year aforesaid, at the county aforesaid, approved by the orphans court aforesaid, for the purpose aforesaid; and the said *Joseph* and *Elizabeth*, on the day and year aforesaid, at the county aforesaid, with the consent and approbation of the orphans court aforesaid, did consent to abide by the award and determination of the said *Abraham Crapster, Abraham Jones and John Campbell*, arbitrators, indifferently elected, chosen and named, as well by the mutual consent of said *Joseph* and *Elizabeth*, as by the approbation of the orphans court of the county aforesaid, to arbitrate, award, determine and adjudge, of and concerning all, and all manner of actions upon the disputed claim of the said *Joseph* against the said *Richard Lawrence*, deceased, at any time theretofore had, made or moved. And the said *Joseph* further saith, that the said *Abraham Crapster*, *Abraham Jones* and *John Campbell*, having taken upon themselves the burden of the said arbitration, did in due manner make and publish their award in writing, of and concerning the said matters in difference between the said *Joseph* and *Elizabeth*, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date the first day of June, in the year of our Lord one thousand eight hundred and eleven; and did thereby award and direct, that the said *Elizabeth* should pay to the said *Joseph* the sum of four hundred and fifty-two pounds six shillings and eleven pence, current money, with interest, and costs of suit thereon, as recovered from the said *Joseph James* by a certain *Peter Kennel*, in the court of chancery in this state, as by the said award, reference being thereto had, will more fully appear; of which said award the said *Elizabeth* afterwards had notice. And whereas the said *Elizabeth Lawrence*, after the making of the award aforesaid, intermarried with a certain *Robert Bennett*, and after her said intermarriage she was removed from the office of administratrix of the estate of the said *Richard Lawrence*, by the orphans court of *Frederick* county, by due course of law; and being so removed, the said *Otho Lawrence* was by the orphans court of said county, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and fourteen, appointed administrator of all and singular the goods and chattels, rights and credits, which were of *Richard Lawrence* at the time of his death, as appears by the order of said court now into court brought; and the said *Otho Lawrence* took upon himself the burden of the said administration; yet the said *Elizabeth* hath not at any time, nor hath the said *Otho* at any time, paid to the said *Joseph* the said sum of four hundred and fifty-two pounds six shillings and eleven pence current money, in the said award mentioned, or any part thereof, although to pay the same sum of money the said *Elizabeth*, while she continued in the office of administratrix as aforesaid, and the said *Otho* since his appointment as aforesaid, hath often been requested as aforesaid; whereby an action hath accrued to the said *Joseph* to demand and have of the said *Otho*, the sum of four hundred and fifty-two pounds six shillings and eleven pence current money, to the damage of the said *Joseph* in the sum of five thousand dollars current money; and therefore he brings suit, and so forth." To which the defendant demurred generally, and on joinder in demurrer, it was ruled good. The plaintiff appealed.

Many questions were agitated in the argument before this court, which it is unnecessary now to decide. The award, as set out in the declaration, is "that the said *Elizabeth* pay to the said *Joseph* the sum of four hundred and fifty-two pounds six shillings and eleven pence current money, with interest, and costs of suit thereon, as recovered from the said *Joseph James* by a certain *Peter Kennel*, in the court of chancery in this state." The amount thus awarded creates but a single debt, and gives to the plaintiff but one cause of action, which the law will not permit him to split up and divide into two or more suits at his pleasure. The plaintiff, should he be permitted to recover the £452 6 11 in this case, may immediately commence an action for the interest and costs thereon, as recovered in the court of chancery; thus multiplying litigation in a way which the law never tolerates. The judgment of the court below is therefore sustainable on this ground. But suppose this difficulty removed, the plaintiff is immediately encountered by others equally insurmountable. The declaration states that the arbitrators "award and direct that the said *Elizabeth* should pay to the said *Joseph*," not as administratrix or in her representative character, but individually. Upon what pretence then can the plaintiff ask, in a court of law, to charge the individual debt of *Elizabeth* upon the defendant as administrator of *Richard Lawrence?* But grant that the award declared on had been, that *Elizabeth* as administratrix should pay, and had been so set out in the declaration; and grant also that in this form of action on such an award a subsequent administrator of *Richard Lawrence* might be answerable as such, still the plaintiff appears not in court, in an attitude which gives him the smallest chance of success. The breach alleged is, that neither *Elizabeth* nor *Otho* hath paid, "whereby an action hath accrued to the said plaintiff to have and demand of the said *Otho* the said sum of money," thus charging him, not as administrator, but in his individual character. If a judgment were entered for the plaintiff on this declaration, execution must go against the body of the defendant, or *de bonis propriis* only, thus making him, without any promise to pay a default on his part, personally answerable for a debt, which it is not even insinuated that he is bound to pay, otherwise than with the effects of the deceased which have come to his hands. At an act of injustice so flagrant, every principle of reason, equity and law revolts.

JUDGMENT AFFIRMED.

THE STATE, use of THE LEVY COURT, &c. *vs.* MERRYMAN.—June, 1826.

By the acts of 1795, *ch.* 53, and 1798, *ch.* 34, the justices of the levy courts of the several counties are authorised and required, on some day between the 1st of March and the 1st of October annually, to meet to adjust the ordinary expenses of their several counties, and to impose an assessment sufficient to defray such charges, and to appoint a collector of the same—*Held,* that the power vested in the levy courts to impose taxes is a specially delegated power, and like other specially delegated powers, must be strictly pursued; and that such court had no authority, although it met between the 1st of March and the 1st of October, to adjourn to any day beyond the 1st of October, for the purpose of completing the levy; and any tax imposed at such adjourned meeting, was without authority, and illegal; and although such tax was collected by the collector appointed for the purpose, yet an action on his bond could not be sustained for the amount so collected.

In giving judgment on a demurrer to a plea, &c. the court go to the first error.

When there are issues in law and in fact, and it appears by the judgment on the former that the plaintiff has no cause of action, it is not necessary that the latter should be tried by the jury.

APPEAL from *Baltimore* County Court. Debt by the appellant against the appellee, (the defendant in that court,) brought upon the following bond, viz. "Know all men by these presents, that we *William Merryman*, *John Merryman*, of *Benjamin*, and *Nicholas Merryman*, all of *Baltimore* county, in the state of *Maryland*, are held and firmly bound unto the said state of *Maryland,* in the full and just sum of fifty-one thousand four hundred and forty-one pounds two shillings and sixpence, current money of the state of *Maryland,* to be paid to the said state; to the which payment, well and truly to be made and done, we bind ourselves, our and each of our heirs, firmly by these presents. Sealed with our seals, and dated this 20th day of December, 1811. The condition of the above obligation is such, that if the above bound *William Merryman,* as collector of the tax for *Baltimore* county, shall well and faithfully execute his office, and the several duties required of him by law, and shall well and truly account for and pay to the justices of the levy court of *Baltimore* county, or their order, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct, then the above obligation to be void, else to be and remain in full force and virtue in law." The defendant prayed oyer of the bond, and pleaded—1. That the levy court of *Baltimore* county did not, at any time between the 1st day of March and the 1st of October 1811, adjust, lay or impose, any county levy for *Baltimore* county aforesaid, agreeably to the provisions of the act, entitled, "An act for the establishment and regulation of the levy courts in the several counties of this state." 2. General performance, preceded by an oyer of the bond. *Replication* to the *first* plea, that the justices of the levy court for *Baltimore* county, between the 1st of March and 1st of October 1811, to wit, on the 12th of March, in the year aforesaid, did convene and meet together at the court-house in the city of *Baltimore,* in *Baltimore* county aforesaid, to adjust the ordinary and necessary expenses of *Baltimore* county, including an allowance for the poor of said county, and for public roads, and for the payment thereof, with a commission for the collection of the same, and to impose an assessment or rate, on all property within said county, sufficient to defray the expense of such county charges, according to the acts of assembly in such cases made and provided; and being so convened and met together for the purposes aforesaid, the said justices of the levy court did then and there adjourn from time to time for the purposes aforesaid, until the 20th of December, in the year aforesaid, when the said justices did, to wit, at the county aforesaid, adjust the ordinary and necessary expenses of the county aforesaid, and did impose an assessment or rate, on all property within said county, sufficient to defray the county charges, to wit, the sum of £20,095 6 3 current money, to wit, at the county aforesaid; of all which premises the said *William* then and there had notice. To this replication the defendant demurred, and the plaintiff joined in demurrer. *Replication* to the *second* plea, (after protesting that *W. Merryman* had not performed, &c.) that at the time of making the said writing obligatory, in the declaration aforesaid mentioned, the said *William* was appointed collector of the county charges and public assessments imposed by law on the inhabitants of said county, and duly authorised and empowered to collect and receive the same; and that before the making of the said writing obligatory, to wit, on the 20th of December 1811, at a levy court held at the city of *Baltimore*, in and for *Baltimore* county, there was assessed and levied by the justices of the levy court the sum of £20,095 6 3 current money, upon the assessable property in said county, and to be collected and paid to the said justices of the levy court, or to their order. That the said *William* then being collector of the assessments and county taxes of the said county for the year 1811, thereunto duly authorised and appointed, then and there had notice that the said sum of £25,720 6 3 current money, was assessed and levied by the justices aforesaid; and the said *William*, as collector of the assessment and taxes aforesaid, was then and there entrusted, authorised and empowered, to collect and receive the same, to wit, at the county aforesaid; yet the said *William*, the said sum of current money, or any part thereof, hath not well and truly accounted for or paid to the said justices of the said levy court, or their order, but hath wholly neglected and refused so to do; and this the said state, by its said attorneys, is ready to verify, &c. And for further breach, &c. that by an act of the general assembly of *Maryland*, begun and held at the city of *Annapolis*, on Monday, the 5th of November 1810, entitled, "An act authorising the raising of a sum of money to complete the court-house, and to erect a watch-house in the city of *Baltimore*," it was, amongst other things, enacted, "that the levy court of *Baltimore* county be and they are hereby authorised and required, to assess and levy upon the assessable property of said county, in such successive annual instalments, any sum not exceeding $20,000 annually, as they may from time to time think proper, as well for the payment of any debts or expenses heretofore contracted or incurred, as for the raising such sums as may be hereafter necessary for the finishing and completing the new court-house in the city of *Baltimore;* the first instalment to be assessed by the said court at their first session after the passage of the said act for the purpose of laying the county levy, and the same to be collected by the collector of said county." That after the passing of the said act, and before the making of the said writing obligatory, at a levy court held next after the passing of said act for the purpose of laying the county levy, to wit, at a levy court held at the city of *Baltimore,* in and for *Baltimore* county aforesaid, on the 20th of December 1811, there was assessed and levied, for the purposes in the said act mentioned, as before stated, by the justices of the levy court for *Baltimore* county aforesaid, the sum of £5,625 current money, to be collected from the assessable property of said county, pursuant to the directions of the said act. That at the time of making the said writing obligatory, the said *William* was duly authorised to collect the assessment and county taxes of said county for the year 1811, and then and there had notice that the said sum of £5,625 current money, was assessed and levied by the said justices for the purposes aforesaid; and the said *William,* as the collector of the assessments and taxes as aforesaid, was then and there, by virtue of the act of assembly aforesaid, authorised and empowered to collect and receive the said sum of money last mentioned, to wit, at the county aforesaid; yet the said *William,* the said sum of current money, or any part thereof, hath not well and truly accounted for and paid, &c. The defendant rejoined to the *second* replication—that as to the *first* breach in the said replication alleged, as consists in not accounting for and paying to the justices of the levy court as aforesaid, or their order, the sum of £20,095 6 3, stated to have been assessed and levied by the said justices of the levy court upon the assessable property of said county, that said state its action aforesaid thereof against him ought not to have and maintain; because he saith that he the said *William,* the said sum of £20,095 6 3, to them the said justices of the levy court, or their order, before the impetration of the original writ in this action, did well and truly account for and pay over, to wit, at the county aforesaid; and of this he puts himself upon the country, &c. Issue joined. And as to so much of the *second* breach, in said replication alleged, as consists in not accounting for and paying to the said justices of the levy court, or their order, of the sum of £3,750, part of the said sum of £5,625, so as aforesaid stated to have been assessed and levied by the said justices of the levy court upon the assessable property of said county, that the said *William*, the said sum of £3,750, to them the said justices of the levy court, or their order, before the impetration of the original writ in this action, did well and truly account for and pay; and of this he puts himself upon the country, &c. Issue joined. And as to so much of the said *second* breach, as consists in not paying to said justices of the levy court, or their order, the sum of £1,875, the residue of said sum of £5,965, so as aforesaid suggested to have been levied by the said justices of the levy court ~~upon~~ the assessable property of said county, that the said justices of the levy court did not, at a levy court held for the purpose of laying the county levy next after the passing of the said act of assembly, entitled, "An act authorising the raising of a sum of money to complete the court-house and erect a watch-house in the city of *Baltimore*," assess and levy the said sum of £5,625 current money, upon the assessable property of *Baltimore* county; and this he is ready to verify, &c. There was a general demurrer by the plaintiff to the rejoinder to that part of the *second* breach alleged in the replication as last above mentioned, and joinder in demurrer. The county court sustained the demurrer to the replication to the *first* plea, and overruled the demurrer to the rejoinder to the latter part of the *second* breach alleged in the replication to the *second* plea; and rendered judgment to the defendant; and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and DORSEY, J.

Heath and *R. Johnson*, for the Appellant, contended—1. That for the purpose of assessing and levying the county tax, it was sufficient for the levy court to convene between the 1st of March and the 1st of October, and proceed with the business entrusted to it; and that having so done, they had the power to adjourn from time to time, until the 20th of December, and then to lay the assessment or levy. 2. That the levy court, so convening in March, and having the power or right to adjourn from time to time, and having adjourned from time to time to the 20th of December 1811, and then imposed the sum of £5,625 upon the county for completing the new court-house, substantially complied with the provisions of the act of 1810, *ch.* 168. 3. That the court below erred in taking the decision of the issues in fact from the jury, and in deciding them itself.

To show that the justices of the levy court, having met between the 1st of March and the 1st of October annually, for the purpose of adjusting the ordinary and necessary expenses of their county, might adjourn from time to time after the 1st of October, and complete the levy, they referred to the acts of 1794, *ch.* 53, *s.* 1, 9, and *ch.* 10, *s.* 3; and 1798, *ch.* 34, *s.* 5. They contended, that the cases of *Ellicott, et al. vs. the Levy Court, &c.* 1 *Harr. & Johns* 36, and *Quynn vs. The State, use of Pue, et al. Ibid* 359, did not affect this case.

The second rejoinder, which alleges that the defendant paid over a part of the sum levied, and as to the residue, viz. the whole amount, states that there had been no levy made, was inconsistent, and no answer to the replication.

If it is objected that there is no averment in the replication that the defendant was appointed collector, and that he accepted, &c. it may be answered that that fact is not denied in the plea, and therefore need not be averred.

Williams, (District Attorney of *U. S.)* and *Mitchell*, for the Appellee. There were four issues in this case, two of law, and two in fact. The issues in fact were not noticed by the court, nor was it necessary to notice them, the whole ground having been disposed of by the decision on the issues in law. *Lawe vs. King*, 1 *Saund.* 80, *(note* 1.) *O'Brien, et ux. vs. Hardy*, 3 *Harr. & Johns.* 434. *Chapman vs. Dixon's Adm'x.* 4 *Harr. & Johns.* 527. And 1 *Chitty's Plead.* 647. They contended—1. That the replications were defective in not averring that the defendant was appointed collector of the county, that he accepted, took the oaths, and gave bond as required by law. 2. The bond was defective in not being, according to the *formula* prescribed by the act of 1794, *ch.* 53, and in being more than double the amount of the assessment imposed and to be collected. 3. That it was a *joint* and not a several bond. It was joint as to the obligors, but several as to their heirs; and the action is brought in *severalty* against one of the obligors. *Gordon vs. Austin*, 4 *T. R.* 611. *South vs. Tanner & Jones*, 2 *Taunt.* 254. The demurrer of the defendant to the *first* replication extends to this defect of suing a *joint* as a *several* bond. 4. The demurrer to the *first* replication is rightly decided in favour of the defendant, because the act of 1794, *ch.* 53, *s.* 1, requires that the levy should be completed between the 1st of March and the 1st of October in the year. *Ellicott, et al. vs. The Levy Court, &c.* 1 *Harr. & Johns.* 359. *Quynn vs. The State, use of Pue, et al. Ibid* 36. The acts of 1794, *ch.* 10, and 1793, *ch.* 43, have nothing to do with the question, those acts having been repealed by that of 1794, *ch.* 53. It was necessary that the levy court should complete the duties imposed on them before the month of November, as, under the constitution, new justices might then be appointed. The authority of the court was a special one, and ought to have been strictly pursued. *Kerr, et al. vs. The State, use of Levy Court, &c.* 3 *Harr. & Johns.* 560. 5. The plaintiff's demurrer to the *second* rejoinder was properly overruled. The act of 1810, *ch.* 168, relative to the new court house, required the levy to be made at the first session of the levy court, (which is shown to have been on the 12th of March,) and it was only made on the 20th of December following; and further, the act of 1794, *ch.* 53, directs the court to meet between the 1st of March and 1st of October annually. The demurrer admits the fact that the court did not meet at the time required; and if they did not so meet, they cannot sustain the action. The act of 1817, *ch.* 22, shows what construction ought to be given to the act of 1794, *ch.* 53. The first act for building the court-house passed in 1805, *ch.* 91. This act required that the bond of the collector should be given to the levy court, and that the money levied should be paid to the commissioners appointed to superintend the building. The acts of 1808, *ch.* 75, and 1809, *ch.* 196, contain similar provisions; but the act of 1810, *ch.* 168, repeals those acts, and makes no provision respecting the collector's bond, or to whom the money levied is to be paid. 6. The act of 1794, *ch.* 53, provides, that in case of an action brought on the collector's bond, an attested copy should be produced in evidence. Here the action is brought on a bond not proved to be the original, nor is it an attested copy.

The *second* breach in the replication to the plea of performance was insufficient, as there was no averment that the object of the assessment was that required by the act of 1810, *ch.* 168, which was an extraordinary assessment, and not required by the act of 1794, *ch.* 53. It was a special power delegated to the levy court, which ought to have been strictly pursued. The necessity of the object in laying the levy is omitted in the replication. The bond is, that the collector shall pay such sum as he shall collect; and the replication does not aver that any money was received by the collector. The same objection is applicable to the replication to the *first* plea. In that replication there is no breach at all that the collector collected the money, and did not pay it over. That such averments were necessary, they referred to 5 *Bac. Ab.* tit. *Obligation*, 172. *Cornwallis vs. Savery*, 2 *Burr.* 773. *Lord Arlington vs. Merricke*, 3 *Saund.* 411, *(note.)* *Shum vs. Farrington*, 1 *Bos. & Pull.* 640. 1 *Chitty's Plead.* 398. The bond is not *exactly* in double the amount of the sum levied. *Smith vs. Jansen*, 8 *Johns. Rep.* 111. The rejoinder to the *second* replication is payment in part, and no legal levy as to the residue. This is partly a question of fact, and partly a question of law; and may be pleaded as two distinct facts. If the matter is badly pleaded as to the fact, but is good as to the residue, and the demurrer goes to the whole, it cures the defect as to the fact pleaded. Instead of demurring to the whole, the plaintiff should have taken issue on that part as to the fact, and demurred to the residue. 5 *Com. Dig.* tit. *Pleader*, (C 85,) 378, pl 2. *Ibid* (C 32.) *Co. Litt.* 304. 1 *Chitty's Plead.* 260. *Pinkney vs. The Inhabitants of*, &c. 3 *Saund.* 379, 380. No action of *debt* could be brought on the bond against the defendant *alone.* There should have been a joint *scire facias* on the bond against the principal and sureties, and not an action of debt, as directed by the act of 1794, *ch.* 53, *s.* 2, like a *scire facias* on a loan office bond, as directed by the acts of 1769, *ch.* 14, *s.* 12, 13; 1773, *ch.* 26, *s.* 9, 10; 1780, *ch.* 24; 1781, *ch.* 23; 1784, *ch.* 55; and 1785, *ch.* 83, *s.* 11, *ch.* 74, *s.* 6. Here was a new power created—a new tribunal erected upon a new subject matter, with exclusive authority to proceed in a particular form of action. No other mode can be adopted than the one prescribed. In the case of heirs and devisees under the statute of *W* & *M. ch.* 14, as that statute directs heirs to be joined, in debt on bond, it is necessary both in law and equity. *Gawler vs. Wade,* 1 *P. Wm.* 99. *Wilson vs. Knubley,* 7 *East,* 128. 1 *Chitty's Plead.* 39, 40. 2 *Chitty's Plead.* 160, *(note.) Jefferson vs. Morton,* 2 *Saund.* 7, *(note* 4.*)* *Bac. Ab.* tit. *Heir,* (F.) *Vin. Ab.* tit. *Heirs & Devisees,* (Z.) *Warren vs. Stawell,* 2 *Atk.* 125. But whether it be an action of debt or a *scire facias,* it must be jointly against the principal and sureties. *Cabell vs. Vaughan,* 1 *Saund.* 291, (*note* 4.) The time of meeting of the levy court is stated in the *second* replication to be in December, and nothing is said about an adjournment of the court. If the time was material at all, then the meeting, as here stated, was not at the period prescribed by law. October 1780, *ch.* 26; 1790, *ch.* 33, *s.* 2, 9; 1791, *ch.* 61; 1793, *ch.* 46; 1794, *ch.* 10. The last act, *section* 3, is restricted in the preamble to particular counties. *Fisher vs. Blight,* 2 *Cranch,* 400. 6 *Bac. Ab.* 381. Where time is prescribed it must be adhered to. The day is material. *The King vs. The Mayor and Burgesses of Tregony,* 8 *Mod.* 111, 112. *The King vs. The Commissioners of Sewers, &c.* 2 *Ld. Raym.* 1479. S. C. 2 *Stra.* 763. *Doe vs. Milborne,* 2 *T. R.* 721. *Taylor vs. Horde,* 1 *Burr.* 60. 6 *Com. Dig.* tit. *Power,* (*C* 6,) (B 3;) *Rex vs. The Inhabitants of Polsted,* 2 *Stra.* 1263. *Rex vs. Fisher, Ib.* 865. *Rex vs. Inhabitants of Haughton,* 1 *Stra.* 83. 4 *Com. Dig.* 672. *Dakin's* case, 3 *Saund.* 291. The levy lists are to be transmitted to the general assembly in November, which shows that the levy must be completed before November.

Buchanan, Ch. J. delivered the opinion of the court. By the *first* section of the act of 1794, *ch.* 53, and the *third* section of the act of 1798, *ch.* 34, the justices of the levy courts of the several counties of the state, are "authorised and required, on some day between the first of March, and the first of October annually, to meet at the court-house of their respective counties, to adjust the ordinary and necessary expenses of their several counties, &c. and to impose an assessment, &c. sufficient to defray such charges;" "and to appoint a person or persons to collect the same." And by the *first* section of the act of 1810, *ch.* 168, the levy court of *Baltimore* county, was authorised and required to assess and levy, in successive annual instalments, not exceeding twenty thousand dollars annually, such sum as should be necessary, among other things, for completing the new court-house in the city of *Baltimore*; "the first instalment to be assessed at their first session (after the passage of that act,) for the purpose of laying the county levy, and to be collected by the collector of the county."

William Merryman, the defendant, was appointed by the levy court collector of the taxes for *Baltimore* county, and on the twentieth of December, in the year 1811, gave his bond to the state as such, on which bond this suit was instituted. After craving and obtaining oyer of the bond, he pleaded, 1st. That the levy court of *Baltimore* county did not, at any time between the first of March and the first of October, in the year 1811, impose any county levy for *Baltimore* county, agreeably to the provisions of the act of 1794, *ch.* 53. And 2d. General performance. The replication to the *first* plea alleges, that the justices of the levy court of *Baltimore* county did meet at the court-house in the city of *Baltimore*, between the 1st of March and the 1st of October, in the year 1811, to wit, on the 12th of March, to adjust the ordinary and necessary expenses of *Baltimore* county, &c. according to the acts of assembly, &c. and for that purpose adjourned from time to time, until the 20th of December 1811, when they adjusted the ordinary and necessary expenses of the county, &c. and imposed a tax sufficient to defray the county charges, of £20,095 6 3, of which the defendant had notice, &c. To which there was a demurrer by the defendant, and joinder in demurrer.

The replication to the *second* plea, (the plea of performance,) alleges—*First.* That at the time of executing the bond, the defendant was appointed collector of the county charges of *Baltimore* county; and that before the making of the bond, to wit, on the 20th of December 1811, at a levy court held in the city of *Baltimore*, there was assessed and levied, &c. the sum of £20,095 6 3, to be collected and paid to the justices of the levy court, or their order, of which the defendant had notice, and which, as collector of the taxes, he was duly entrusted and empowered to collect; and assigns for breach, that he has not well and truly accounted for or paid to the justices of the levy court, or their order, the said sum of money, or any part thereof, &c. And *secondly*—After reciting so much of the act of 1810, *ch.* 168, as authorises and requires the levy court of *Baltimore* county to impose a tax for completing the new court-house, alleges, that before the making of the bond, at a levy court held for the purpose of laying the county tax, &c. next after the passing of that act, to wit, on the 20th of December 1811, there was assessed and levied, for the purposes mentioned in that act, the sum of £5,625, of which the defendant had notice; that he was, at the time of making the bond, duly authorised to collect the county taxes; and that as collector of the county taxes he was authorised and entrusted to collect the tax imposed in virtue of the act of 1810, *ch.* 168; and assigns for further breach, that he has not well and truly accounted for and paid to the justices of the levy court, or their order, the last mentioned tax, or any part thereof, &c. Issue was joined on the *first* breach assigned in the replication to the plea of performance; and as to the *second* breach, the defendant rejoined payment of a part of the sum of £5,625, alleged to have been assessed and levied, &c. and as to the residue of that sum, that the justices of the levy court did not, at a levy court held for the purpose of laying the county levy, next after the passage of the act of 1810, *ch.* 168, assess and levy the said sum of £5,625, &c. to which there was a demurrer, and joinder in demurrer.

The judgment of the court below was against the plaintiff, the appellant here; and the material question presented for consideration is, whether the justices of the levy court of *Balti-*

more county could legally, and within the scope of their authority, impose a tax either for defraying the ordinary expenses of the county, or for completing the court-house, at any time except between the first day of March, and the first day of October annually? It has been urged in argument, that independent of the necessity of the thing, the *fifth* section of the act of 1798, ch. 34, which entitles each of the justices of the levy court to a compensation for his services, "for every day he shall attend to the duties of his office," clearly recognizes their power to adjourn from day to day; and that express authority is given by the *third* section of the act of 1794, *ch.* 10, to the justices of the levy courts throughout the state, to adjourn their respective courts from time to time, at their discretion, for the purpose of laying the levy; and therefore, that they are not bound by the act of 1794, *ch.* 53, to make the levy between the 1st of March and the 1st of October, but may adjourn to any time beyond the 1st of October for that purpose. It cannot be doubted that the respective levy courts may be adjourned from day to day; and it may also be admitted, that the enacting clause of the *third* section of the act of 1794, *ch.* 10, authorising, in the language of that clause, "the justices of the levy courts of the several counties of this state, to adjourn their respective courts from time to time, for the purpose of laying the levy, as they may think necessary," does extend to the levy courts of all the counties in the state, though the preamble relates only to particular counties; yet that does not obviate the objection to the proceedings of the levy court of *Baltimore* county, as exhibited in the pleadings in this cause. Before the act of 1794, *ch.* 53, particular times were fixed by law for the meeting of the justices of the levy courts of the several counties, but there was no time prescribed within which the levies were to be made; and supposing the enacting clause of the *third* section of the act of 1794, *ch.* 10, to extend to all the counties in the state, they might, in their discretion, have adjourned from time to time, to any time within the year, there being no other limit. But it was thought necessary by the legislature to make an alteration in this respect; and accordingly by the act of 1794, *ch.* 53, the levy courts of the respective counties of the state are required to meet, in the words of the law, "on some day between the first day of March and the first day of October annually, to adjust the ordinary and necessary expenses of their respective counties, and to impose an assessment," &c. If it was not the intention of the legislature that the assessment should be imposed before the 1st of October, it was unnecessary to restrict the meeting for that purpose within those limits, and would have been sufficient to direct the meeting to be on some day after the first of March, leaving the levy courts at large to adjourn, in their discretion, to any time within the year, as before, if such discretionary power was meant to be vested; but the confining the meeting to impose the assessment to a time between the first of March and the first of October, shews it to have been the intention of the legislature, that it should not be imposed after the first of October, and restrains the power of adjournment beyond that time, which before had no limit within the year. No other construction can well be given to that act. The space between the first of March and the first of October annually, is the time allotted to the justices of the several levy courts for imposing the respective levies, and they are not authorised to meet for that purpose at any time after the first of October; but the meeting, whether by adjournment or otherwise, at which the assessment is imposed, is required to be within the limits so prescribed, with no other restriction, or any power of adjournment, that may have before existed, than the merely confining the exercise of it within those limits. The latitude allowed between the first of March and the first of October, assists in showing the intention of the legislature, and the restricting the authority to impose the assessment, to the first of October, was necessary for the purpose of giving time to the collectors to make their collections.

The power vested in the levy courts to impose taxes, is a specially delegated power, and like other specially delegated powers, must be strictly pursued; which does not appear to have been done in this case. The replication to the *first* plea alleges, that the justices of the levy court of *Baltimore* county met on the 12th of March 1811, adjourned from time to time until the 20th of December 1811, when they imposed the tax to defray the ordinary county charges; which adjournment to the 20th of December, and meeting of the levy court on that day, being both without authority, the imposing the tax was illegal, and the replication shows no cause of action in the appellant; the demurrer therefore was properly sustained.

As to the replication to the plea of performance, the allegation, both as respects the imposing the tax, which is stated to have been laid for defraying the ordinary county charges, and the tax for completing the court-house is, that it was done at a levy court held on the 20th of December 1811, without stating it to be by adjournment, or that there had been any meeting for that purpose, by the justices of the levy court, between the 1st of March and the 1st of October. And as it is perfectly clear, that the justices of the levy court had no authority to meet for the first time, for the purpose of imposing the county levy on the 20th of December, or at any time after the 1st of October, their proceedings, as set out in that replication, were wholly illegal. The replication, therefore, shows no sufficient cause of action; and as the demurrer to the rejoinder carried the court up to the first defect, the demurrer was properly determined in favour of the defendant, no matter how defective the rejoinder may be.

There is nothing in the objection, that the issues in fact were taken from the jury, and decided by the court; the demurrers being determined in favour of the defendant, and it appearing upon the whole that the plaintiff had no cause of action, the court did right in giving judgment for the defendant.

There were several questions raised in argument on points of special pleading, which, under the view that has been taken of the case, it is not thought necessary to examine.

JUDGMENT AFFIRMED.

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Clopper's Adm'r. *vs.* The Union Bank of Maryland.—June, 1826.

The execution of a mortgage, by an accommodation endorser to the holder, to secure the payment of a promissory note, does not extinguish the note in relation to any of the parties to it.

Where a promissory note was drawn by C, in favour of P, and by him endorsed to the holder, and P, after the note fell due, gave the holder his own note for the debt—*Held*, that the first note was not extinguished, unless the last was received by the holder, in substitution and in satisfaction of the first.

Giving time to the endorser of a promissory note, drawn and negotiated, with the knowledge of the holder, for the accommodation of the endorser, will not discharge the maker. In relation to the effect of giving time in cases of notes and bills of exchange, there is no distinction between real and accommodation paper.

A covenant not to sue generally, without any limitation as to time, is in law a release, and may be pleaded as such, but a covenant not to sue for a limited period, cannot be pleaded in suspension of a creditor's action; but if he sues upon it, the debtor's remedy is an action upon the covenant. But this latter doctrine does not extend to actions of *assumpsit;* and therefore, where the holder of a note, in consideration that the accommodated endorser, would give him a mortgage to secure its payment, stipulated that he would not, for a definite period sue the maker, and suit was brought against the maker before that period had passed, it was held that it could not be maintained, though the maker was no party to such stipulation.

Appeal from *Baltimore* County Court. *Assumpsit* brought on the 9th of March 1820, by the Appellees, the plaintiffs in the court below, against the Appellant's intestate. The declaration contained two counts—one on a promissory note drawn on the 23d of June 1819, by *Clopper*, in favour of *Isaac Phillips & Co.* for $3,000, payable sixty days after the date, and endorsed by *Phillips & Co.* to the plaintiffs. The other for money lent and advanced. The defendant pleaded *non assumpsit*, and issue was joined.

At the trial it was admitted that the note, upon which this action was brought, was one of eight notes, drawn by *Andrew Clopper*, in favour of and endorsed by *Isaac Phillips & Co.* and negotiated at the *Union Bank of Maryland*, for the accommodation of the endorsers, each for $3,000, and payable at different periods respectively, from the 17th of June to the 12th of August, 1819; that previous to the falling due of any of these notes, on the 16th of June 1819, *Isaac Phillips* conveyed, by deed of mortgage, to the bank, his dwelling-house, and lots attached thereto, as a collateral security for the payment of the notes, and that the bank in the said mortgage allowed *Phillips* three years for the redemption of the property mortgaged. That on the 17th day of June 1819, the day on which the first of the notes fell due, the cashier of the bank wrote the following letter to *Clopper*, the drawer: "This bank hold eight notes, drawn by you, in favour of *Isaac Phillips & Co.* for their accommodation, each for $3,000; the first of these notes falls due and payable this day, the residue of the notes become payable as follows:" The 2d note for $3,000, payable 21—24 June, 1819; the 3d for 3,000, on the 28—1 July; the 4th for 3,000, on the 5—8 July; the 5th for 3,000, on the 12—15 July; the 6th for 3,000, on the 19—22 July; the 7th for 3,000, on the 2—5 August, and the 8th for 3,000, on the 9—12 August; "as security in part, or as collateral security for payment of your notes, *I. Phillips* has conveyed, by deed of mortgage to this institution, his dwelling-house and lots attached thereto; the bank have given three years for the redemption thereof. I am instructed by the board to make you acquainted with these circumstances, and to inform you that your notes, as above recited, if not paid, will be held as security to the *Union Bank of Maryland*, and that if there be hereafter any deficiency, the bank will hold you accountable for the same." That the above letter was delivered on the same 17th of June 1819, to *Clopper*, to whom it was addressed. That on the 9th of September 1819, the following letter was addressed by the cashier of the bank to *Isaac Phillips & Co.* and received by them. "*Union Bank of Maryland*, September 9th, 1819. The board of directors of the *Union Bank of Maryland*, have resolved that a reduction shall take place upon accommodation paper, commencing on the 1st of November next, to be paid at the rate of ten *per cent.* in every sixty days, upon the sum required to be paid; the reduction required from you will be $12,000." That the said several notes successively falling due on the several days mentioned above, were not paid by *Clopper* or *Phillips & Co.* and that neither of them were ever renewed at the bank, except that the first was delivered up to *Phillips & Co.* on receiving from them the first of eight promissory notes, given in pursuance of the aforesaid deed of mortgage; and that the proceeds of the mortgage were subsequently applied, by arrangement, to the extinguishment of part of the notes, of which the note, upon which this action is brought, was not one. That the following is a correct copy of the mortgage deed referred to. "This indenture made this 16th day of June 1819, between *Isaac Phillips*, merchant, of the city of *Baltimore*, and state of *Maryland*, of the one part, and the President and Directors of the *Union Bank of Maryland*, of the city of *Baltimore*, and state aforesaid, of the other part, witnesseth," &c. "And whereas the said *Isaac Phillips* is indebted to the said president and directors of the *Union Bank of Maryland* twenty-four thousand dollars, upon eight promissory notes, for three thousand dollars, drawn by *Andrew Clopper*, to and in favour of *Isaac Phillips* and *Company*, and by them endorsed and discounted at said bank, for the use and accommodation of the said *Isaac Phillips* and *Company*; and to secure the payment thereof, with interest thereon, the said *Isaac Phillips* hath agreed to execute these presents. Now this indenture witnesseth, that the said *Isaac Phillips*, in consideration of the said debt or sum of twenty-four thousand dollars, due and owing," &c. "and for the better securing the payment thereof, with interest," &c. "and also in consideration of the further sum of five dollars," &c. he conveyed to the president and directors, &c. sundry parcels of land, &c. "provided always, and these presents are upon this express condition, and it is hereby declared to be the true intent and meaning hereof, and of the said parties hereunto, that if the said *Isaac Phillips*, his heirs, executors or administrators, or any of them, do and shall, within the term of three years from the date hereof, well and truly pay, take up and retire, all and every the promissory notes herein before mentioned, amounting together as aforesaid to the sum of twenty-four thousand dollars, which have been negotiable as aforesaid, at the *Union Bank of Maryland*, for the use of the said *Isaac Phillips* and *Company*, and any and all other notes that may at any time hereafter be substituted for and in lieu of the said notes already negotiated as aforesaid, by way of extending, in point of time, the said accommodation in whole or in part, and shall, in the mean-time, and at the expiration of every sixty days in succession, pay at the said *Union Bank of Maryland* the discount or interest upon the said eight promissory notes, or such part of them as shall, from time to time, remain unpaid, then this indenture, and every clause, matter and thing, herein contained, shall cease, determine, and be absolutely void, and of no effect in law or equity, any thing herein contained to the contrary thereof, in anywise notwithstanding." That upon this deed of mortgage a bill of foreclosure having been filed on the 30th of August 1820, there was a decree, by consent, on the 19th of December 1820, for the sale of the mortgaged property, under which decree it was sold on the 2d of March 1821, for the sum of $12,000, and that sum was applied to the partial extinguishment of the said accommodation loan. It is also admitted, that this suit was instituted on the last but one of the first mentioned notes of *Clopper*. That *Phillips & Co.* did not pay or renew the notes, so given as aforesaid, by them, to the cashier of the said bank, nor did they communicate with *Clopper* relative to the said settlement with the plaintiffs. That the first of the notes so drawn by *Clopper*, and endorsed by *Phillips & Co.* and discounted for the accommodation of the latter, was taken up and retired on the 5th day of August 1819, by the endorsers, by a substitution of the note of *Phillips & Co.* of that date, made payable to the cashier of the bank for $3000, they paying the discount. That *Phillips & Co.* did also give their seven other promissory notes, of the dates, and for the sums, and made payable at the times herein particularly set out, to wit—one on the 12th, one on the 19th, and one on the 26th of August, 1819, for $3000 each, payable, one on the 11th, one on the 21st, and one on the 28th of October 1819. One other note on the 2d, one on the 9th, one on the 16th, and one on the 23d of September 1819, each for $3000, payable, one on the 4th, one on the 14th, one on the 18th, and the other on the 25th of November 1819. The defendant then gave in evidence, that *Phillips & Co.* were under the impression and belief, that on the delivery of the said notes, substituted as above stated for the original notes of which the defendant was the maker, the notes of the latter were to be given up and cancelled, but that there was no express agreement to that effect. That *Isaac Phillips & Co.* asked for the surrender of the second of *Clopper*'s notes, when they gave their second note to the cashier, which was then, and ever after, refused and denied by the plaintiffs, as was also the case with the remaining six. The defendant also gave in evidence, that at the time, but previous to the execution of the mortgage deed aforesaid, it was expressly stipulated by and between *Isaac Phillips* and the cashier of the said bank, on behalf of the plaintiffs, that *Phil-*

lips & Co. should not be called on or required to pay any portion of the principal sums, lent as aforesaid as an accommodation to *Phillips & Co.* for the space of three years from the execution of the mortgage; and further, that no suit should be instituted against *Andrew Clopper*, until after the expiration of three years from the date of the mortgage, upon the aforesaid accommodation loan; and that to secure these advantages of time to *Phillips & Co.* and of indulgence to *Clopper*, were the inducements that led *Phillips* to offer to mortgage, and accordingly to execute a mortgage of his real estate to the plaintiffs, an estate which cost him more than $33,000; and that the defendant was and still is largely indebted, and under great embarrassments on his own account. The defendant then moved the court to direct the jury, that if they believed that the plaintiffs did agree with *Phillips & Co.* at the time of executing the said mortgage, that *Clopper* should not be sued on said notes until the expiration of three years from that time, that then the present suit could not be maintained. He also prayed the court to direct the jury, that upon the whole case, if the jury believed the evidence, the plaintiffs were not entitled to recover. Which direction the Court [WARD, A. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and DORSEY, J.

Williams, (District Attorney of *U. S.*) and *R. Johnson*, for the Appellant. 1. The acceptance of the mortgage, and of the substituted notes of *Phillips & Co.* extinguished the original notes as to *Clopper*, the maker. *Williamson v. Andrew*, 4 *Harr. & M'Hen.* 482. *Williams vs. Hodgson*, 2 *Harr. & Johns.* 474.

2. *Clopper* being a surety for *Phillips & Co.* and being known to be such to the appellees, was discharged by their giving time to *Phillips & Co.* to pay the note sued upon after it fell due. *Chitty on Bills*, 299, (Ed. in 1817.) *Rees vs. Berrington*, 2 *Ves.* jr. 540. *King vs. Baldwin*, 2 *Johns. Chan. Rep.* 559. *Ludlow vs. Simond*, 2 *Caine's Cas.* 58. *Carstairs vs. Rolleston*, 5 *Taunt.* 551. *Withall vs.*

Masterman, 2 *Campb.* 179. *Ex parte Wilson*, 11 *Ves.* 441. *Laxton vs. Peat*, 2 *Campb.* 185. *Collett vs. Haigh*, 3 *Campb.* 281. *Brown vs. Maffey*, 15 *East*, 216. *French vs. Bank of Columbia*, 4 *Cranch*, 161. *Pothier on Exchange*, *No.* 177, 178, 180. *Chitty on Bills*, 215. *English vs. Darley*, 2 *Bos. & Pull.* 61.

3. The agreement not to sue *Clopper* for three years from the date of the mortgage, was good and valid, and binding on the appellees; and this action being brought before the expiration of that time, was prematurely instituted. *Littler vs. Holland*, 3 *T. R.* 590. 4 *Starkie's Evid.* 1050. *Cuff vs. Penn*, 1 *Maule & Selw.* 21; and *Watkins vs. Hodges & Lansdale*, 6 *Harr. & Johns.* 38.

Taney and *Kennedy*, for the Appellees. It has been assumed as a fact, which the record will not justify, that the appellees knew that the notes, when they were discounted, were for the accommodation of *Phillips & Co.* It may be admitted that the appellees knew the fact at the time of taking the mortgage as a security from *Phillips & Co.* but there is no evidence of their knowledge when the notes were originally discounted; nor is there any evidence that the notes were renewed, or the discount paid on them, after the mortgage. The stipulation was that the interest should be paid at the end of every sixty days.

1. The mortgage was not a substitution of the original notes, nor an extinguishment of them. Where a contract is merged, it must be by some subsequent act of the same parties. Where there is a previous joint liability a bond will extinguish a simple contract debt, but it must be a bond for the same debt, and intended as a substitution for the former contract. In this case there is no covenant in the mortgage for payment of the debt. This mortgage was taken as additional security, and does not extinguish the notes which were left as a subsisting debt. Collateral security may be taken without operating to extinguish the original debt. *Hurd vs. Little*, 12 *Mass. Rep.* 502. *Chitty on Bills*, 376. Whether or not the appellees received the notes of *Phillips* & *Co.* as a substitute for the other notes, was a fact for the jury, and as such must be proved. *Patapsco Insurance Company vs. Smith, et al.* 6 *Harr. & Johns.* 168.

2. The principle is, that if you give time to the drawer, you discharge all the endorsers, unless they consent to it. So the giving time to a preceding endorser, releases a subsequent endorser. *Chitty on Bills*, 380, (Ed. 1821.) *Carstairs vs. Rolleston*, 5 *Taunt.* 551. Does an accommodation note, known to be such by the parties, stand upon different grounds than a real note? The cases of *Laxton vs. Peat*, 2 *Campb.* 185, and *Collett vs. Haigh*, 3 *Campb.* 281, cited for the appellant, have been both overruled by *Fentum vs. Pocock*, 5 *Taunt.* 192. See also *Chitty on Bills*, 383, *(note,)* and *Kerrison vs. Cooke*, 3 *Campb.* 362. And it is now settled, that there is no distinction in a court of law between real and accommodation notes. *Wood vs. Repold*, 3 *Harr. & Johns.* 125. *Smith vs. Knox*, 3 *Esp. Rep.* 47. *Mallett vs. Thompson*, 5 *Esp. Rep* 178. *Carstairs vs. Rolleston*, 5 *Taunt.* 551. *Ex parte Barclay*, 7 *Ves.* 597. *Clarke vs. Develin*, 3 *Bos. & Pull.* 363. *Stevens vs. Lynch*, 12 *East*, 38. *Chitty on Bills*, 373.

3. The contract for delay was not a contract for three years indulgence. *Phillips* was to pay the interest; and even if he could not be sued, there is nothing to show that such contract enured to the benefit of *Clopper*. *Carstairs vs. Rolleston*, 5 *Taunt.* 551. If *Clopper* could not have the benefit of a release, he could not have the benefit of the extension of the time. He was no party to the contract, and can take no advantage under it. If the time had been four instead of three years, the act of limitations would be a bar to *Clopper's* notes; for he was not bound by the contract. A covenant never to bring suit, is different in its legal effect, for the purpose of this question, from a covenant not to sue for a limited time. 5 *Bac. Ab.* tit. *Release*, (A 2,) 683, 684. But the contract could not prevent a suit even against *Phillips*. He would be left to his remedy on it if it was violated by the appellees.

ARCHER, J. delivered the opinion of the court. We do not conceive, that by any transactions which have taken place between *Phillips & Co.* and the *Union Bank of Maryland*, in relation to the promissory note, which is in this suit the subject of litigation, there has been an extinguishment of the original contract. The mortgage taken by the *Union Bank* was only for the purpose of securing to that institution the payment of the securities mentioned in it. The parties to that instrument never intended that it should constitute a new debt, nor did it bind *Phillips & Company* by any new obligations; but it was a recognition of the existing liability, and was intended to operate merely as a security for its discharge. It contains an express stipulation that it is to be void upon the payment of the notes, of which *Phillips & Co.* were the endorsers. The notes given by *Phillips & Co.* after the execution of the mortgage, would not operate as an extinguishment of the notes drawn by *Clopper*, and endorsed by *Phillips & Co.* unless they were received by the bank in substitution, and in satisfaction of the prior notes. The record contains no evidence from which such an inference would be deducible.

It is urged, by the counsel for the appellant, that being only a security for *Phillips & Co.* and being known to be such by the *Union Bank* at the date of the mortgage given by *Phillips & Co.* by which an extension of time was granted to them, by such indulgence he has been discharged from all liability as the drawer of these notes. That in the ordinary case of principal and surety, time given to the principal discharges the surety, is a legal position as well settled as any other appertaining to the science. But its application to a case of this description may well be questioned.

In every bill of exchange, the acceptor, and in every promissory note, the drawer, is in law the principal, and is first liable, and every endorser in the order in which his name appears on the bill or note. The endorsee may sue all or any of the parties he may choose. He has the entire dominion of the property in the bill, and a perfect right to make any arrangements he pleases with any of them, but he does it at his peril; for if he thereby alter the situation of any other person on the bill, to the prejudice of that person, he cannot afterwards proceed against him. Therefore, though he may give time to, or discharge his immediate endorser, he cannot grant indulgence to the drawer or acceptor, and afterwards proceed against the endorser. The discharge of, or the giving time to, any of the parties liable, does not discharge prior parties, but only those whose names are subsequent to the party thus discharged, or to whom indulgence is granted. This doctrine is laid down in *Gwynne vs. Heaton*, 1 *Brown's Chancery Reports*, 4, in a note by Mr. *Eden*, and is abundantly supported by the numerous authorities there referred to. Whether the note is one springing out of a consideration actually passing between the parties, or is only an accommodation note, does not seem to make a difference in the law in this respect. It is certain that a contrary doctrine has been held by Lord *Ellenborough*, in the case of *Laxton vs. Peat*, 2 *Campb.* 185. But this decision has, in the *English* courts, been since uniformly considered a deviation from established principles. Its authority was doubted by Chief Justice *Gibbs* in *Kerrison vs. Cooke*, 3 *Campb.* 362; and although in his decision in that case he attempts a distinction between it and *Laxton vs. Peat*,, he does in effect overrule Lord *Ellenborough's* decision, and he expressed his regret that the term, accommodation bill, ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiable securities. Lord *Eldon*, in *Ex parte Wilson*, 11 *Vesey*, 411, denounces any such distinction as that attempted to be made in *Laxton vs. Peat*. In the case of *Fentum vs. Pocock*, 5 *Taunt.* 192, the doctrine decided in the case referred to, came in review before the judges of the court of common pleas, and it was there expressly overruled, and it was determined that nothing could discharge an acceptor but a release or payment, and that there was no difference between an accommodation acceptance, and an acceptance for value. Indeed in *Mallet vs. Thompson*, 5 *Espinasse's Rep.* 178, decided five years before the case of *Laxton vs. Peat*, Lord *Ellenborough* made a determination directly contrary to the case of *Laxton vs. Peat*. From this review of the adjudications, we can have no hesitation in pronouncing that the case of *Laxton vs Peat* is not law. Courts of justice seem disposed to consider accommodation notes in the same light, as far as practicable, with notes for value. In this court, in the case of *Wood vs. Repold*, 3 *Harr. & Johns.* 125, it was adjudged that accommodation endorsers, as to their liability to each other, stood precisely in the same relation as did endorsers on notes for value, and that a subsequent endorser paying the amount of the bill, was not bound to look only for a contribution upon its payment from his co-endorsers, but that he had a right to recover the whole amount from his prior endorser. They were not held at all in the light of co-securities, but each was considered as impliedly engaging to indemnify whomsoever should place his name on the instrument subsequently to him. As it regards the principle upon which notice has been required to be given, there does not appear to be any distinction between the different species of notes. Notice of nonacceptance and nonpayment, is required to be given, that the anterior parties to the bill may take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given, it is a presumption of law that the drawers and endorsers are injured by the omission. And in the application of this principle, it is necessary that the courts should inquire into the liabilities of the respective parties to a note or bill, for the purpose of ascertaining whether this injury, either actual or presumptive, could take place. Where a note is drawn for the accommodation of the endorser, he is not entitled to notice of nonpayment, because the presumption of injury could by no possibility arise, the drawer not being answerable over to him upon his payment. But this enquiry into the situation of the parties, their liabilities, and the circumstances under which it is drawn, is not peculiar to accommodation paper, but is applicable also to other notes. Thus a drawer, who has no effects in the hands of the drawee, and has no reason to expect the bill would be paid when it became due, is not entitled to notice. There seems to be a disposition of late manifested by the courts, to discountenance many of those subtle refinements which have, by a kind of judicial legislation, recently crept into the law of bills of exchange and promissory notes, and which have threatened to render it a science of cases merely, and not of principle. That this is the case may be seen by a reference to the opinion of Chief Justice *Abbot*, in *Cory vs. Scott*, 3 *Barn. & Ald.* 619, (5 *Serg. & Lowb.* 401.) When any system of laws is governed by plain and intelligible rules, it becomes known to the public, and the interests of a commercial people will thereby be better promoted than by trusting each case to judicial discretion. We do not believe that the appellant was discharged by the time given to *Phillips & Co.*

It is objected that this suit, having been instituted by the *Union Bank*, in contravention of its agreement with *Phillips & Co.* not to sue *Clopper* for three years, has been prematurely brought. It is laid down in 5 *Bacon's Ab.* tit. *Release*, (A 2,) 683, that a covenant perpetual, as that the covenantor will not sue without any limitation of time, is a defeasance or absolute release, and is pleadable in bar as such; and a distinction is there taken between such a covenant and one stipulating not to sue for a limited time; and that in the latter case it could not be pleaded in suspension of the action, but the covenantee must seek his redress in an action upon the covenant. Such is the undoubted law in an action of covenant; but we do not find, from an examination, that it has ever been extended to the action of *assumpsit*; and we do not feel disposed, by adjudication from analogy to extend it; for it cannot but be admitted that it is a principle tending to inconvenience, and producing circuity of action. Besides, we conceive that by giving the agreement the effect of defeating the action, until the time of indulgence has expired, a greater certainty of justice will be attained between the parties, than by driving the defendant to his action for damages on the agreement. But independent of this view of the case, we may observe, that the cause of action here, is one which may be sustained under the general count for money had and received; and in such an action the defendant is at liberty to place himself upon such defences, as will shew that *ex æquo et bono*, the plaintiff is not entitled to recover. We consider him, therefore, at liberty to give in evidence an agreement granting indulgence, where that agreement is founded on a proper consideration, and from which it would appear to be inequitable to allow the plaintiff, by violating his engagement, to recover. We cannot believe that this agreement is void for want of a consideration, for the inducement to its consummation is the mortgage which was entered into by *Phillips & Co.* to the bank.

Whatever might be the force of the objection, that this agreement not to sue could have no obligation, its consideration relating to land, and the mortgage containing the stipulation between the parties, it is sufficient to say that it preceded the mortgage, and that the testimony does not shew whether it is in writing or not. This court cannot say it was a verbal agreement, for the purpose of invalidating it. If any reliance could have been placed on the fact of its having been merely verbal, it should have so appeared in the bill of exceptions.

We entertain no doubt but that the agreement is valid, and that *Clopper* may avail himself of it, although made by *Phillips & Co.* One man may surely make a contract for the benefit of another, which will enable that other to institute a suit upon it.

We consider that this suit has been prematurely brought, and that therefore the judgment of the court below must be reversed.

JUDGMENT REVERSED.

The City Bank of Baltimore *vs.* Bateman.—June, 1826.

In an action against a banking company, where the sum of money in dispute was proved by other evidence to have belonged to the plaintiff, it was held competent for him to give in evidence the directions of the president and cashier, to their inferior officers, in relation to the manner in which they were to apply such money in discharge of the debts of the bank, although the president and cashier were within reach of the court's process, as it was to be presumed they had authority to give such directions.

Although generally the admissions or declarations of third persons are inadmissible evidence; yet where the relation of principal and agent is established, the acts and declarations of the agent, within the scope of his authority, are as admissible evidence as the acts and declarations of the principal himself, but not so where they are made out of the limits of his authority; in the latter case the agent must be produced.

A declaration made by the president of the bank, to one of the inferior officers, that certain money, which had been brought into the bank by one of the directors, was the money of the plaintiff—*Held* not to be admissible evidence, because he had no authority, as president, to make such declaration, and because, although the corporate name of the bank was "The President," &c. and he is sued in that name, he is only so sued, and is only liable in his corporate capacity, and cannot be considered as a party on the record, so as to let his declarations in evidence against himself, but should be produced as a witness by the plaintiff, as he might be so produced, and compelled to testify, although he was also a stockholder, and his evidence might affect his interest as a stockholder.

Where the money of the plaintiff was used by the bank in paying notes of a denomination less than $5, called counter tickets, and which had been issued by the bank, signed, some by the cashier, some by the plaintiff, as teller, and some by other officers of the bank, on such notes being brought in for payment, under an advertisement of the bank calling them in for that purpose—*Held*, that the plaintiff might recover the amount in an action of *assumpsit*, without an enquiry into the authority by which such notes were issued.

Appeal from *Harford* County Court. *Assumpsit* by the appellee against the appellants, brought in *Baltimore* county court, and removed to *Harford* county court. The declaration contained *four* counts—for money laid out, expended and paid—had and received—lent and advanced—and on an *insimul computassent*. Plea, *non assumpsit*, and issue.

1. The plaintiff at the trial proved that he was the proprietor of ten kegs and one bag of dollars, containing in all $11,000, which were brought to the banking house of the defendants, without and against the will and consent of the plaintiff. He further offered in evidence, by *John S. Gittings*, who was a clerk of the defendants, that *Samuel Hollingsworth* was the president of the said bank, and *Robert Barry* the cashier *pro tempore*, and both of them were stockholders; and that they, *Hollingsworth* and *Barry*, while acting as president and cashier as aforesaid, told the witness to pay away the said money of the plaintiff, in discharge of the debts of the bank; which he accordingly did; and that *Hugh D. Evans*, a director of the bank, brought into the bank another bag of dollars, which *Hollingsworth* told the witness was the money of the plaintiff, and obtained in the same manner as the other, and directed him to pay it away, for the use of the bank, in the same manner as he had done the other, which he did. *Subpœnas* had issued, and had been served, by the plaintiff, on both *Barry* and *Hollingsworth*, but no further proceeding adopted to procure their attendance, although they were within the reach of the process of the court. To the admission of this evidence the defendants objected. But the Court, [*Archer*, Ch. J. and *Hanson* and *Ward*, A. J.] overruled the objection, and admitted the evidence to go to the jury. The defendants excepted.

2. The plaintiff then offered *Charles Gwinn* as a witness, it being admitted that he was, at the time of the transaction referred to, and still was, a stockholder in said bank; to whose competency, as a witness, the defendants objected, though the wit-

ness waived all objection on his part to be sworn in the cause. The court overruled the objection. The defendants excepted.

3. The plaintiff then offered in evidence, that several years before 1819, the City Bank of *Baltimore* caused a considerable number of notes, commonly called bank notes, to be issued for sums less than five dollars, and in some cases for sums less than a dollar; and that these notes were sometimes signed by the cashier, sometimes by the teller, *Bateman*, and sometimes by other officers of the bank, and were paid away and received by the bank in their transactions, in the same manner as were notes of a larger description. That when, on the 26th of May 1819, the bank failed, the president and directors advertised, requesting all persons holding these smaller notes to bring them into the bank, and receive specie for them. That accordingly such notes, to a considerable amount, were brought in by the holders of them, and were taken up by the officers of the bank, by paying specie for them; and that the payment of *Bateman's* money, spoken of by *John S. Gittings*, was, among other things, to redeem these small notes, or as he called them, counter-tickets. The defendants then prayed the court to direct the jury, that if they believed the evidence so given, the plaintiff was not entitled to recover. Which direction the court refused to give. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued at last June term, before Buchanan, Ch. J. and Martin and Stephen, J.

Taney and *Glenn*, for the Appellants, stated, that the only point to be determined was, whether the declarations of a member of a corporation were evidence against the corporation, where they are made at a time when he is not engaged in making a contract on behalf of the corporation? They contended, that they were not evidence; and cited *Bank of Columbia vs. Patterson*, 7 *Cranch*, 299, 305. 1 *Phill. Evid.* 77. 2 *Bac. Ab.* tit. *Corporations*, (E 3,) 13. The *Mayor*, *&c. of London vs. Long*, 1 *Campb.* 25; and *Taney vs. Kemp*, 4 *Harr. & Johns.* 348.

Wirt, (Attorney General of *U. S.*) and *R. Johnson*, for the

Appellee, cited 1 *Phill. Evid.* 50, 72. *The King vs. Inhabitants of Hardwick,* 11 *East,* 577. *The King vs. Inhabitants of Terrington,* 15 *East,* 471. *The King vs. Inhabitants of Woburn,* 10 *East,* 395; and 1 *Liv. on Agency,* 44, 48, 49, 286, 392 to 394.

Curia adv. vult.

At this term the opinion of the court was delivered by BUCHANAN, Ch. J. This case comes up on *three* bills of exceptions, taken at the trial on the part of the appellants. The statement in the *first* bill of exceptions is, that the appellee proved he was the proprietor of ten kegs and one bag of dollars, containing in all $11,000, which were taken to the banking house of the appellants without and against his will and consent; and that he offered to prove by *John S. Gittings,* a clerk of the appellants, that *Samuel Hollingsworth* was the president, and *Robert Barry* the cashier *pro tempore,* of the institution, and were both of them stockholders; and that while acting as president and cashier, they told him the witness, to pay away the said money of the appellee in discharge of the debts of the institution, which he did; and that *Hugh D. Evans,* a director, took into the bank another bag of dollars, which the said *Hollingsworth* told the witness was also the money of the appellee, obtained in the same manner as the other, and directed him to pay it away for the use of the institution, as he had done the other, which he accordingly did.

The admissibility of the testimony of this witness was objected to on the part of the appellants, but the objection was overruled by the court before which the cause was tried; and whether it was admissible or not in the whole, or in part, is now submitted to this court for consideration.

To the admissibility of that part of the testimony of *John S. Gittings,* which relates to the ten kegs and one bag of dollars, that had before been proved to be the property of the appellee, there does not seem to be any well founded objection, as it cannot well be doubted, that a president and cashier of an institution, such as the *City Bank of Baltimore,* may legitimately direct an inferior clerk to pay out monies in the bank, in discharge of the debts due by the bank; and if they have authority to give such directions, there is no principle which goes to exclude evidence of such directions being given, in a case in which they are pertinent to the issue.

But whether the witness was competent to prove that *Hollingsworth*, the president, told him, that another bag of dollars, which was afterwards taken into the bank by one of the directors, was the property of the appellee, in order to charge the appellants with the amount in this suit, is a different question.

Admissions or declarations by third persons, are in general inadmissible; but the relation of principal and agent excludes the application of this rule; and it is a general principle, that where an agency is sufficiently established, the acts and declarations of the agent, within the scope of his authority, are to be considered as the acts and declarations of the principal, of which evidence may be given, as if they had been actually done and made by the principal himself. But an agent cannot bind the principal beyond the scope of the authority delegated to him; and where he makes any declarations or representations of his own authority, such declarations or representations cannot be received in evidence to charge the principal, but the agent must himself be called to prove any thing he may know in relation to the subject of such declarations or representations.

As if a letter be written by an agent to his principal, informing him of what he has done, that being no part of the contract itself, made by him for the principal, but a representation only of what he has done, it is inadmissible in evidence against the principal, his authority being only to make the contract, and not to bind the principal by declarations or representations made afterwards, which form no part of the contract. 2 *Starkie on Evid*. 61. *Langhorn vs. Allnutt*, 4 *Taunton*, 511. *Kahl vs. Jansen, Ibid* 565. *Maesters vs. Abraham*, 1 *Esp. Rep*. 375. *Helyear vs. Hawke*, 5 *Esp. Rep*. 74. *Peto vs. Hague, Ibid* 134. *The President, &c. of Hartford Bank vs. Hart*, 3 *Day's Rep*. 491, 495. *Fairlie vs. Hastings*, 10 *Ves*. 125.

Viewing *Samuel Hollingsworth* then, the president of the institution, as the agent of the corporation, any act done by him in pursuance of, and coextensive only with his authority, would bind the corporation; but declarations not making a part of the *res gestæ*, and being representations only, of his own mere authority, of what was done, could not properly be received in evidence against the corporation. The information given by him to *John S. Gittings*, that a bag of dollars, which had been taken into the bank by one of the directors, was the money of the appellee, was of that character; it was no act of his as agent of that institution, binding upon his employers, but a mere representation made by him, in relation to the acts and rights of others; a declaration, (not within the scope of his authority, nor in any way connected with it,) that money carried into bank by one man, was the property of another, and taken without his consent; and being a representation, not within the scope of his authority, it was not legally admissible in evidence, looking to him in the relative character of agent only; but he should himself have been called to prove the fact, if within his knowledge, that it was the property of the appellee.

Neither was it admissible on the ground of *Samuel Hollingsworth* being a party to the suit.

The admissions of a party on the record are always evidence against himself, because, being a party, he cannot be compelled to give evidence against his interest in a court of law.

But that principle does not reach to this case; the suit is against "*The President, Directors and Company, of the City Bank of Baltimore*," and though *Samuel Hollingsworth* is the president of that institution, yet he is sued, and is a party on the record only in his corporate capacity, and not in his natural and individual capacity; he has no corporate existence apart from "*The President, Directors and Company, of the City Bank of Baltimore*," and is only answerable in this suit in that character. There was, therefore, no objection to his being sworn and examined as a witness against the appellants on the ground of his being a party to the suit. And the only objection that could have been plausibly raised to his being examined as a witness, to prove that the bag of dollars, which was taken into the bank by *Hugh D. Evans*, belonged to the appellee, was, that being a stockholder, he was interested in the fund to be affected by the verdict. But that could not have been an objection on the part of the appellants, nor resting on the ground of incompetency; but if an objection at all, it could only have come from *Hollingsworth* himself, and that on the score of privilege, on the supposed principle that a witness is not, in a court of law, obliged to give evidence against his own interest, or such as may subject him to pecuniary loss. And admitting it to be true, that if he could not have been called, and compelled to give testimony against his own interest, his representation to *John S. Gittings*, that the bag of dollars taken into the bank by *Hugh D. Evans*, belonged to the appellee, might for that reason have been given in evidence against the appellants, without his having previously refused to be examined, then this inquiry arises, could he, if he had been called, have excused himself from giving evidence of that fact, or against his own interest?

On this subject many nice distinctions are to be found in the books, and some of them not very easily to be reconciled. On the part of the appellee it is contended, that *Samuel Hollingsworth*, being a stockholder, he could not have been compelled to give evidence against his interest in the funds of the institution, and therefore, that evidence of his representation, relative to the bag of dollars taken to the bank by *Hugh D. Evans*, was admissible. And the cases of *The King vs. The Inhabitants of Woburn*, 10 *East*, 395, and *The King vs. The Inhabitants of Hardwick*, 11 *East*, 578, have been much relied on in argument.

They were both settlement cases. In the first, *The King vs. The Inhabitants of Woburn*, a rated inhabitant was called as a witness, but refused to give evidence, and it was determined that he was not compellable to give evidence; and in the other case, *The King vs. The Inhabitants of Hardwick*, it was held that the declarations of a rated parishioner, respecting the circumstances of a settlement, were admissible in evidence, because he was not compellable to give testimony. But those cases were not decided on the principle that a person is excused from giving evidence against his interest, but expressly on the ground, that the persons called as witnesses were parties to the proceedings. And in the first case Lord *Ellenborough* takes the distinction between a party to a suit, who is called to give evidence against his will, by the opposite party, and a mere witness who claims to be exempted from giving evidence against his interest. And in *The Mayor, &c. of London vs. Long*, 1 *Campb. Rep.* 22, it was decided that the declarations of an individual corporator could not be given in evidence against the corporation; and on an occasion in the *British* house of lords, where the twelve judges were required to give their opinions *seriatim*, eight of the twelve were of opinion, that a witness was bound to answer every question touching the issue, with the exception of such only as would expose him to a criminal prosecution, or to a penalty or forfeiture. Lord *Eldon*, and the Lord Chancellor, Lord *Erskine*, expressed themselves to the same effect. The principle recognized by the Lord Chancellor, Lord *Eldon*, and the eight judges, was, that although in courts of law a party could not be made a witness, yet those persons who were brought forward as witnesses, were equally bound to disclose the whole truth, as the parties were in a court of equity. And Lord *Mansfield* laid down the rule to be, that where a witness could be forced to answer by a court of equity, in order that his answer might be read as evidence in a court of law, in all such cases a court of law would compel him to answer at the trial. In *Taney vs. Kemp*, 4 *Harr. & Johns.* 348, it was ruled that a witness is bound to answer a question touching the issue in an action at law, in which he is not a party, although it may establish, or tend to establish, that he owes a debt, or otherwise subject him to a civil suit, or bill in chancery. And if a witness is bound to answer a question, which may establish that he owes, and subject him to the payment of a debt, it is difficult to perceive why he should not be compelled to answer a question, that may have a tendency to lessen the value of his bank stock; and surely there is no principle of justice, which would exempt a man from giving evidence of a fact, by the concealment of which he would be enabled to practice a fraud upon another; and what in such case, has a witness to complain of? Why simply, that by being compelled to answer, he is forced to do an act of justice. To such complaints it is not the business of courts of justice to give their attention.

Considering *Samuel Hollingsworth* then, as not a party to this suit, in his natural and individual capacity, we think he would have been bound, if called as a witness, to answer any question touching the issue, though it might injuriously affect his interest as a stockholder; and therefore the evidence of his representation to *Gittings*, relative to the money taken into bank by *Hugh D. Evans*, was improperly admitted.

It would be of serious consequence to the people of this state, if a stockholder of a chartered bank could not be compelled to give evidence against the institution, and to such institutions themselves, if evidence could be admitted against them, of the loose declarations of stockholders; and this embraces the subject of the *second* bill of exceptions, which is taken to the opinion of the court below, overruling an objection on the part of the appellants, to the competency of a witness offered by the appellee, on the ground of his being a stockholder in the bank, the witness himself waiving all objection to being sworn; and we entirely concur in the opinion expressed in that exception.

The evidence set out in the *third* and last bill of exceptions, in addition to that contained in the *first*, is substantially that the appellants, having caused a large number of notes, commonly called counter tickets, to be issued, of denominations less than five dollars, signed, some of them by the cashier, some by the teller, the appellee, and some by other officers of the bank, which were paid away and received in the transactions of the bank as notes of a larger denomination were, requested by advertisement the holders of them to bring them in for payment; that a considerable number of them were accordingly brought in, and that payment of the appellee's money, spoken of by *John S. Gittings* as stated in the *first* bill of exceptions, was among other purposes, made in discharge of these small notes. On which the court was called upon, on the part of the appellants, to direct the jury, that if they believed the evidence, the appellee was not entitled to recover; which direction the court refused to give. It is not necessary to stop to inquire by what authority those small notes were issued and signed in the manner described; so far as they were taken up, with the money of the appellee, the appellants had the use and benefit of that money, and are chargeable with the amount in this action. As far, therefore, as respects the ten kegs and one bag of dollars, amounting in all to $11,000, which are stated in the *first* bill of exception, to have been proved to be the money of the appellee, and paid away in discharge of the debts of the appellants, for any thing appearing in this record, the appellee is entitled to recover; and if the opinion of the court below had been so qualified, we should have concurred in that opinion. But thinking, as we do, that the evidence, as set out in the *first* exception, of the representation made to the witness by *Samuel Hollingsworth*, in relation to the bag of dollars that was taken into the bank by *Hugh D. Evans*, was improperly admitted, and that the appellee was not entitled to recover any thing on that account, we are constrained to dissent from the unqualified refusal of that court to which the last exception was taken.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

* * *

Howard *vs.* Ramsay.—June, 1826.

Replevin for goods and chattels taken in the house of the plaintiff the 20th February 1822. The defendant avowed the taking, &c. because one J. J. for two years ending the 22d August, 1821, and from thence until, &c. held and enjoyed the said house, as a sub-tenant thereof, to one W. M. he being the assignee of one S. R. of a lease before then assigned to S. R. by one N. R. the lessee in a demise made by the defendant and J. G. H. her then husband, to N. R. on the 22d August, 1801, under a rent of $100, payable on the 22d August annually, for the term of 99 years, &c. And because $200 of the said rent, for two years ending the 22d August, 1821, was due and in arrear under said demise by defendant and her husband, who, seized of the premises only in right of the defendant, died the 25th of November 1819, the defendant avowed the taking the said goods and chattels as for distress for said rent so due to her. To this avowry the plaintiff pleaded three pleas—1. That the defendant did not demise the house, &c. in manner and form as is in the avowry alleged. 2. That said J. J did not hold and enjoy the house as tenant thereof to the defendant, under the supposed demise thereof in the avowry mentioned, in manner and form, &c. 3. That there was no rent in arrear, &c. To the first two pleas the defendant demurred, and took issue on the third—*Held*, first, that the first plea was bad in substance, because the demise stated in the avowry was a joint demise by defendant and her husband, and the plea traversed a demise by the defendant only, which was the tender of an immaterial issue that would not be cured by the verdict. *Held*, secondly, that the second plea was good, because the demise it referred to and traversed, was the joint demise by defendant and her husband, stated in the avowry, and by the avowry J J. was sufficiently, though indirectly, asserted to be the tenant whose goods were subject to the distress; and that if by the avowry it appeared that

J. J. was in no degree, and for no purpose, the tenant of the avowant, the avowry itself would be bad. *Held*, thirdly, that as the second plea, which was ruled good on the demurrer, went to the whole cause of action of the avowant, it was necessary to try the issue in fact joined on the third plea.

In *covenant* there must be a perfect privity between plaintiff and defendant, but such privity is not necessary to make one's goods liable to a distress for rent as a tenant. A distress is rather a remedy upon the land demised, than against the person of a tenant, although some tenancy must be shown to sustain it.

APPEAL from *Baltimore* County Court. Replevin. The case is fully stated in the opinion delivered by this court. It was argued at last June term, before BUCHANAN, Ch. J. and EARLE, STEPHEN, ARCHER, and DORSEY, J.

Mitchell, for the Appellant. This is an appeal from *Baltimore* county court in an action of replevin brought for various articles of furniture distrained by *Mary W. Howard* for rent in arrear. The avowry justifies the taking, &c. in a dwelling-house of the avowant, because one *John Ilgenfritz*, for the space of two years ending on 22d August 1821, and from thence until the time when, &c. held and enjoyed the said dwelling-house as sub-tenant to *W. M'Mechen*. That *M'Mechen* was assignee of a lease for 99 years, given by Mrs. *Howard and her husband*, to one *Reynolds*, on the 22d day of August 1801. That her husband died on the 25th of November 1819, and that he was seized of the premises *only in her right, &c.* To this avowry, *Ramsay*, the plaintiff below, pleaded three pleas. 1. That the said *Mary* did not devise *in modo et forma* 2. That *John Ilgenfritz* did not hold and enjoy the said premises as *tenant thereof to the said Mary*, under the said demise, in manner and form, &c. 3. That no part of the said rent was in arrear from the said *Ilgenfritz* as alleged, &c. To the *two* first pleas the avowant demurs, and joins issue on the *third*. At the trial, the court having heard the demurrers, first gave judgment overruling the demurrers, and immediately proceeded to enquire the damages for the plaintiff, and to give *final judgment* for him, *without proceeding to try the issue at all.* It was moved at the trial, by the defendant, that the issue in fact should first be tried before final judgment rendered, but the court refused; and to this refusal the defendant's counsel tendered a bill of exceptions, which the court refused to sign or seal; and of these proceedings the defendant complained, and insists they are all erroneous.

1. Because the demurrers ought to have been sustained—To the *first* plea, because it does not answer any matter stated in the avowry. The defendant averred a demise from *James G. Howard* and *Mary Howard.* The plea only denies a *demise* from *Mary Howard* alone, which is materially different. The avowry sets out a *joint* interest. The plea only denies a *separate* interest or title. *Mary Howard*, being a *feme covert*, could not have demised such an estate; without joining her husband, it would have been void. The defendant laid a good demise. The plaintiff does not deny that such a demise was made, and could if proved, have sustained the avowry; but sets up a *void* demise, which the avowant could not have proved. The plea, therefore, was substantially defective; for if the avowant had taken issue upon it, it would have been a departure from the avowry, and so might have been demurred to by the party tendering the issue. As to the *second* plea, the demurrer ought not to have been overruled, for the same reasons. It being laid in the avowry that *Ilgenfritz* held and enjoyed under a joint demise, and the plea merely denying that he held under a *separate demise*, &c. The one averring a *joint* title, and the other denying only a separate and exclusive title.

2. But if the court were right in their judgment upon the demurrers, they erred in giving judgment in chief *without trying the issue in fact* joined upon the *third* plea, because the third plea was not disposed of by their judgment upon the two first. The two first pleas, if correct, only traversed the demise, and the *third* plea expressly admits the demise as laid in the avowry, and the holding and enjoyment of the said *Ilgenfritz* under it; and an admission of these facts upon the record, is conclusive against the plaintiff. The two pleas might be true, in point of fact, and yet the question be open as to the points involved in the third. The two first pleas only deny a separate demise from *Mary Howard*, and the demurrers admit there was no such demise; but then the third plea admits that *Ilgenfritz* held under a joint demise from *James G. Howard* and *Mary Howard*, as laid in the avowry, but avers

there was *no rent* in arrear upon this *joint lease.* The questions were, therefore, materially distinct, and the avowant would have been entitled to judgment if she could have proved rent in arrear upon this joint lease, notwithstanding the judgment upon the demurrers. That a plea of "*nothing in arrear,*" admits the demise as laid, was decided by the supreme court of the *U. S. in Alexander vs. Harris*, 4 *Cranch*, 299, and cases there cited. That the issues *must* be disposed of before a final judgment on demurrers. 5 *Com. Dig.* 483, tit. *Pleader*, (Q. 1.)

The court below erred, therefore, 1. In overruling the demurrers. 2. In giving final judgment without disposing of the issue in fact, or giving some judgment upon that issue by entry of *non pros* or otherwise.

Glenn, for the Appellee. The special causes of demurrer to the first and second pleas are abandoned; and the only question on the demurrers is, whether both of those two first pleas are bad in substance. 1. Is the first plea bad? At common law a lease, by husband and wife, of wife's land, if made by parol, was absolutely void. *Walsall vs. Heath, Cro. Eliz.* 656. And if by writing, was voidable by wife, or her heirs. *Chambers on Leases.* 221, 222. But by stat. 32, *Hen.* VIII. *ch.* 28, leases made in writing by husband and wife, are good and effectual against the lessors, their heirs and successors, &c.

This statute remedies the defect of the common law, and gives the lessee an estate for the term, rendering rent to husband during joint life of himself and wife, and after death of wife, to her heirs. *Hill vs. Saunders,* 2 *Bingh.* 116, per *Best,* Ch. J. The lease then of husband and wife, of wife's land, is in fact, after husband's death, the lease of the wife, the rent being reserved to her and her heirs, and the husband, by the above statute, being restricted from alienating beyond the coverture. But by the stat. of 11 *Geo.* II. *ch.* 19, the landlord being dispensed from setting out his title altogether, and only required to aver an enjoyment by a tenant of the lands under a demise, *during the time in which the rent distrained for incurred,* and which rent still remains due; and all pleadings being only required to answer the *legal effect* of anterior pleading. In this case the rent distrained for having incurred during the time when Mrs.

Howard was sole seized of the premises demised, the legal effect of the avowry is a demise by her of the premises during the time the rent incurred became due; and for this reason the plea that she did not demise, in the manner by her alleged, is good. Moreover the true import and effect of this plea *non demisit*, is that the relationship of landlord and tenant did not exist between the avowant and the supposed tenant of the avowant; and of course a plea *that avowant did not demise, as by her is above alleged*, is a full answer to her statement of a demise of her lands by *baron* and *feme*, and that *baron* died, and she survived him, before any of the rent claimed became due.

2. But suppose the appellee is wrong on this point, the second plea is unquestionably good. It is this, that *Ilgenfritz* did not hold as tenant of *Mary Howard* under the supposed demise thereof in said avowry mentioned, in manner and form as she hath alleged in her avowry. Could he have pleaded that he did not hold as tenant of Mrs. *Howard* and her husband? No: Because her husband was dead before any rent claimed in this suit became due. How was the appellee then liable? Only as tenant of Mrs. *Howard*, who survived; of course the only proper plea must be—not tenant of Mrs. *Howard*, whose tenant was *Ilgenfritz* when the rent became due. If the rent had been due for a time before *baron's* death, perhaps this plea might be bad; but surely where the claim is by Mrs. *Howard* alone for rent due to her alone, the only answer must be that the appellee is not her tenant; and in fact it is utterly impossible to frame any other plea to meet the case. About this then there can be no doubt; and either plea to the avowry being good, the avowant is defeated; for let it be remembered, that in replevin both parties are plaintiffs or actors, and where the avowant avows for rent he becomes peculiarly a plaintiff; and if any one plea of a tenant be good or sustained, the avowant or plaintiff is defeated. To put an instance of a plaintiff in an ordinary suit. He declares in debt, defendant pleads *nit debet* and *limitations*, and the last plea is found for defendant, he has judgment, although the plaintiff succeeds on the first. So here the appellee succeeding on one plea, which goes to the whole case, the avowant or plaintiff is altogether defeated.

3. The issue in fact was not tried, nor was it proper to try

it. *Tidd* in his practice 684, says, where there is an issue in fact and an issue in law, and the issue in law goes to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no necessity to try the issue in fact. This is in point upon this plea; and the ingenious reasoning of the appellant's counsel would answer very well if there was no such thing as pleading double; but he knows we can plead double to an avowry; and that if a precedent plea go to the whole avowry, there can be no necessity to try another one going only part. The plea of *riens in arrere* alone does admit the demise, but when with this plea no demise is also pleaded by leave of the court, the demise is not admitted. This double pleading is for the benefit of the defendant. There is no averment in the avowry of rent due to *baron* and *feme*. The two years rent is averred to grow due *after baron's death, where he was seized only in right of feme during the coverture,* of course by the avowants own shewing nothing is due while the lease was joint and the rent jointly due.

Curia adv. vult.

Earle, J. at this term, delivered the opinion of the court. This appeal presents the case of a replevin founded on a distress for rent. The plaintiff, *Robert Ramsay*, declared for taking his goods and chattels on the 20th of February 1822, in his house, situate on the *Baltimore and York Turnpike Road* in *Baltimore* county. *Mary W. Howard*, the defendant, avowed the taking the goods and chattels in the declaration mentioned, in the dwelling-house of the plaintiff, because one *John Ilgenfritz* for a long time, to wit, for the space of two years ending on the 22d of August 1821, and from thence until, &c. held and enjoyed the said dwelling-house, as a subtenant thereof to one *William M'Mechen*, the said *William* being the assignee of one *Samuel Reynolds*, of a lease or demise before then assigned to the said *Samuel* by one *Nicholas Reynolds*, the lessee named in a demise or lease made to the said *Nicholas*, as lessee, by her the said *Mary W. Howard*, and *James G. Howard*, her then husband, on the 22d of August 1801, under a certain rent of $100, payable on the 22d of August in each and every year, for the term of 99 years from thence next ensuing, over and above all taxes and assessments whatever. And because $200 of the rent aforesaid, for the space of two years ending on the 22d of August 1821, was due and in arrear, by virtue and under the said demise by her, and her husband *James G. Howard*, who seized of the premises only in right of his wife, died on the 25th of November 1819, she avowed the taking the said goods and chattels, in the said dwelling-house, as and for and in the name of a distress for the said rent, so due and in arrear to her the said *Mary W. Howard.* The plaintiff pleaded three distinct pleas to this avowry. They are as follow: "And the said plaintiff, as to the said avowry of the said *Mary* saith, that the said *Mary*, by reason of any thing by her in that behalf alleged, ought not to avow the taking of the said goods and chattels in the said place in which, &c. and justly, &c. because he says, that the said *Mary* did not demise the said premises in which, &c. in manner and form as the said *Mary* hath above in said avowry alleged; and this the said *Robert* prays may be inquired of by the country. And for further plea in this behalf, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, the said *Robert* comes and says, that the said *Mary*, by any thing in the said avowry alleged, ought not to avow the taking of the said goods and chattels in the said place in which, &c. and justly, &c. because he says, that said *Ilgenfritz* did not hold and enjoy the said premises in which, &c. with the appurtenances, as tenant thereof to the said *Mary*, under the said supposed demise thereof in the said avowry mentioned, in manner and form as the said *Mary* hath above in her said avowry in that behalf alleged; and this he, the said *Robert*, prays may be inquired of by the country, &c. And for further plea in this behalf, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, the said *Robert* says, that the said *Mary*, by any thing in her said avowry contained, ought not to avow the taking of the said goods and chattels, in the said place in which, &c. to be just, because he says, that no part of the said supposed rent, in the said avowry mentioned, was or is in arrear from the said *Ilgenfritz* to the said *Mary*, in manner and form as the said *Mary* hath in her said avowry in that behalf alleged; and this he, the said *Robert*, prays may be inquired of by the country, &c."

To the two first of these pleas, the defendant demurred specially, and assigned for cause of demurrer, that the conclusion of the said pleas is to the country, and ought to have concluded with a verification, and that they are both otherwise informal, &c. And to the third plea to the avowry the defendant joined issue with the plaintiff.

The court below overruled the demurrers, and immediately charged the attending jury to inquire into the damages sustained by the plaintiff, *Robert Ramsay*, by reason of the unlawful taking and unjust detention of the goods and chattels in the declaration mentioned, who in an inquisition returned assessed the same to one cent damages, and costs, &c. On this finding the court gave final judgment, and refused to direct the jury to be sworn to try the issue in fact upon the third plea, upon the ground that the judgment rendered on the demurrers to the first and second pleas, was a bar in law to the defendant's further progress in the suit.

Having made this full statement of the case, in which more than usual particularity has been observed, because it involves the subject of pleading, we proceed to an examination of the questions of law arising out of it. The special causes of demurrer to the two first pleas have been abandoned, and the appellant must therefore be considered as contending, that those pleas are *substantially* defective. It is the opinion of this court, that the first plea to the avowry is bad in substance, and that *Baltimore* county court ought not to have overruled the demurrer to that plea. The avowry states a demise on the 22d of August 1801, to *Nicholas Reynolds*, for 99 years, by the husband and the wife. It also states the death of the husband on the 25th of November 1819, and the consequent survivorship of the wife, and the accruing of the rent distrained for, after the death of the husband, and during the sub-tenancy of *Ilgenfritz*. The plea in bar of this part of the avowry, traverses a demise by the wife only, in manner and form as therein alleged; and the ready answer is, that no such demise by the wife is alleged in the avowry. The allegation of the avowry points to a demise by *James G. Howard*, and *Mary W. Howard* his wife; the plea responds a demise by *Mary W. Howard* only. The one sets forth a joint demise; the other insists on a separate demise.

And the real question is, does this distinction between the demises mark the defective character of the plea? We are fully impressed with the opinion that it does; and we test it by remarking, that the isssue tendered by this plea is an immaterial issue, and such as would not have been cured by a verdict. It is not a case where a material allegation is traversed inartificially, for then the issue taken upon it would have been informal, and aided after verdict. But it is a case where a material allegation is overlooked by the plea, and a point is traversed, that will not determine the merits of the cause; and, *ex consequenti*, the issue tendered is an immaterial one. And that the issue tendered here is an immaterial issue, is a position that seems to us to be well supported by the case of *Carpenter vs. Stair*, reported in 1 *Roll. Rep.* 86, referred to by 3 *Saund.* 319, (*note* 6.) It was an action of trespass, where the defendant pleaded in bar an award between the plaintiff and J S and the defendant, and several others, that the defendant should pay to the plaintiff and J S, a certain sum in satisfaction of the trespass, and which he had paid to the plaintiff. The plaintiff replied there was no such award between the *plaintiff and defendant*, as the defendant alleged; and on issue joined, and verdict for plaintiff, it was held, he should not have judgment, because he did not traverse the same award set out in the defendant's plea, but put in issue an award which was not alleged in the plea. The position is further illustrated by the case of *Sandback vs. Turvey, Cro. Jac.* 585. To debt on bond the defendant pleaded payment of a less sum than the sum mentioned in the condition of the bond; the plaintiff replied, that he did not pay the sum mentioned in the condition of the bond; and verdict, that the defendant did not pay the said sum of the bond; this, says the case, is an immaterial issue, not aided by the verdict, for the plaintiff has not traversed the same payment that is in the defendant's plea.

As to the subject of the second plea, the avowry states, that *Ilgenfritz* for a long time, to wit, for the space of two years ending on the 22d of August 1821, and from thence until, &c. held and enjoyed the said dwelling-house, as a sub-tenant thereof to one *William M'Mechen*; and the negative allegation of the plea is, that *Ilgenfritz* did not hold and enjoy the said premises, &c. as tenant thereof to the said *Mary*, under the said supposed demise thereof in the said avowry mentioned, in manner and form as the said *Mary* hath above in her said avowry, in that behalf alleged. The counsel for the appellant has urged, that the demurrer to this second plea involves a consideration of the point above decided on the first plea; and that as to the second plea it ought to receive a like decision, and the judgment on this demurrer ought to be reversed. On the most mature reflection we cannot, in this respect, agree in opinion with the counsel. The demise referred to in the second plea, is the demise by the husband and the wife; for its language is, "under the said supposed demise thereof in the said avowry mentioned." The rent distrained for is said to have accrued under this demise, after the death of the husband; and to sustain the avowry for it, the wife must establish such a relation between her and the party distrained upon, as may in law constitute him in some degree her tenant. *Ramsay* in this business is a mere stranger, whose goods and chattels have been found upon the premises, and *Ilgenfritz* is the person who is indirectly asserted to be the tenant whose goods and chattels are liable to the distress. He is called in the avowry sub-tenant to *William M'Mechen*, the assignee of the lease for 99 years; and if we could for a moment suppose it is thereby meant, that he is in no degree, and for no purpose, the tenant of the avowant, we should incline to think that the avowry is in itself faulty. On the contrary, if the appellation is used to signify the relationship of landlord and tenant between the avowant and *Ilgenfritz*, which is presumed to have been its object, it is not inappropriately declared in the plea that *Ilgenfritz* did not hold and enjoy the said premises as *tenant* thereof to the said *Mary*. And for using this language, the plea is not to be determined to be bad in substance. It is the denial only of a tenancy, which the avowant contends for, and without establishing which, according to the view we have taken of the subject, she cannot support her avowry. A traverse of the sub-tenancy would have amounted to the same thing.

A perfect privity between plaintiff and defendant is not to be dispensed with in an action of covenant for rent arrear; and for the want of it the decisions have been, that covenant could not be sustained against an under lessee. *Holdford vs. Hatch, Doug.* 183. The same degree of privity, it would seem, is not necessary to render a person's goods liable to a distress for rent as a tenant. A distress is rather a remedy upon the land, than on the person of a tenant, although some tenancy must be shown to sustain it. In *Bradby on Distresses*, 112, it is said, that for the purpose of distraining, a tenancy in effect should subsist, without reference to the manner in which it is created; the only question being, whether the relation between the parties does really constitute a tenancy. And in his next page he states, that the occupation of the under-tenant to the lessee, must indeed, in general, be considered with respect to the lessor, as the possession of his lessee, and therefore, that the goods of such under-tenant are liable to be distrained during the continuance of the original lease. And that such under-tenant is treated as the tenant of the original lessor for the purposes of a distress, may be seen by a case decided by Lord *Ellenborough* in the year 1805. It is the case o *Forty vs. Imber*, 6 *East*, 435, 436. Upon the whole, we concur with the court below in their opinion in relation to the demurrer to the second plea, and think they were right in overruling it.

There yet remains a question, connected with this case, to be examined by us. The court below refused to direct the jury to try the issue in fact joined by the parties on the third plea. It is contended there is error in this opinion and refusal of the court, and that the jury ought to have been impannelled to try the issue in fact. This depends on the correctness and effect of the judgment pronounced on the demurrers. Where the issues in law, determined against the plaintiff, go to the whole cause of action, they are conclusive, and there can be no occasion to try the issue in fact. 2 *Tidd's Pract.* 685. The demurrer to the first plea here was incorrectly decided, as we have said above; but the court were right in their opinion on the demurrer to the second plea; and the only point is, whether the issue in law joined in that demurrer goes to the whole cause of action or avowry on this case; and we think it clearly does. The fact admitted by the demurrer is, that *Ilgenfritz* was not the tenant to the avowant, as in her avowry alleged; and this admission leaves to the avowant the naked case of a landlord distraining for rent, without any specified tenant distrained upon. *Ilgenfritz* is confessed not to have held and enjoyed the premises as tenant to *Mary W. Howard,* and *Ramsay's* goods found thereon, cannot be taken to satisfy the rent of a man, whose own goods could not be distrained to pay it.

JUDGMENT AFFIRMED.

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Owings & Piet v. Low.—June, 1826.

In an action of *assumpsit* to recover the value of a quantity of hardware, sold by P, the plaintiff, to D, the defendant—D, the defendant, offered to prove by W, that he the witness, and D and P, had with others, associated together to build several houses; that P was to furnish the necessary hardware, and was to be paid by having an interest in one of the houses when finished; and that the hardware in dispute was delivered by P to D, under this agreement.—*Held,* (on the objection of P,) that W was not a competent witness, because he had an interest in defeating the action; for in case P recovered, he would not only be liable to contribute a proportion of the verdict, but would also be responsible for a proportion of the costs.

Where the court overrule an objection to the competency of a witness, and the party making it is preparing his exception, he does not waive the benefit of it by examining the witness as to the points in issue, before the exception is signed and sealed.

D having given in evidence a written agreement between B, and himself and the said W, by which B agreed to deliver what brick might be necessary to build the said houses, and in part payment was to take one of the houses, P offered to prove by B, that at the time this agreement was made, W and D stipulated that the houses were to be finished by a particular time.—*Held,* that such evidence could not be given by P, the plaintiff, because not being a party to the agreement, he was not bound by it, and could not, therefore, avail himself of it in his favour.

Appeal from *Baltimore* County Court. This was an action of *assumpsit* for goods sold and delivered by the plaintiffs, (now appellants,) as co-partners, to the defendant, (the appellee.) The declaration contained two counts—*Indebitatus assumpsit,* and *quantum meruit.* The defendant pleaded *non assumpsit,* and filed an account in bar, charging the plaintiffs with three-fourths of a house built by the defendant for them, amounting to $4,141 11, and three years ground rent for the ground on which the house stands; together with interest, the whole amounting to $5,346 47.

1. The plaintiffs at the trial proved the delivery of the goods, wares and merchandise, by them to the defendant, for which the suit was brought. The defendant then offered to prove by a certain *John Walsh*, that the plaintiffs, together with the defendant, and the witness and others, associated together to build several houses on *Franklin-street*, in the city of *Baltimore*; that the plaintiffs had agreed to furnish the hardware necessary for the houses, and for payment thereof was to have an interest of three-fourths in one of them when finished. The plaintiffs objected to *Walsh* as a witness, on the ground of his being interested; which objection the Court, [*Dorsey*, Ch. J. and *Hanson*, A. J.] overruled. The plaintiffs excepted; and while drawing the exception, and before it was signed and sealed, the plaintiffs' counsel further asked said witness, whether the houses had not much depreciated in value. To which he replied in the affirmative.

2. The defendant further offered in evidence, by a certain *Charles L. Boehme*, the following agreement between the said *Boehme* and the defendant, and *Walsh*, the witness aforesaid, signed by *Boehme*, dated the 18th of October 1818: "Whereas I, *Charles L. Boehme*, of the city of *Baltimore*, have and did, on or about the thirteenth day of April last, agree with *Henderson P. Low*, to deliver to him and to *John Walsh*, all the bricks that might be required by them for the purpose of building five warehouses and two dwelling-houses on *Franklin-street*, and one dwelling on *North-street*, at the rate of eight dollars p. thousand for good merchantable common brick, customary price for front brick, and what might be customary for extra hauling, in addition to what bricks may be wanting to complete the said houses, which I agree to deliver without delay. I hereby further agree to deliver to the said *Henderson P. Low* and *John Walsh*, or to their executors, administrators or assigns, three hundred thousand good merchantable bricks, in any part of the city that they may require the same, or any part thereof, to be delivered, at the above rate of eight dollars p. thousand, and customary prices for extra hauling; one half of the said three hundred thousand to be delivered between this time and the first of January, if required, and the residue by the first of June next, if required. In payment of the above

bricks, I hereby agree to take one of the dwelling-houses on *Franklin-street* at the actual cost thereof, subject to *annual* rent of ten dollars pr. front foot, the rent commencing on the first of October inst. and for which a lease from Messrs. *Peter & George Hoffman*, the proprietors of the ground, is to be given; the residue is to be paid as follows: One thousand dollars cash; a note at 60 days for one thousand dollars; and a note at sixty days for five hundred dollars. Should there be a balance on either side, the same to be paid when ascertained." On the back of which was the following receipt, signed by the said *Boehme*. "*Baltimore*, October 8, 1818. Rec'd. of *Henderson P. Low* and *John Walsh* five hundred dollars in cash, which, with five hundred dollars rec'd. on the 3d inst. is in full of the cash payment mentioned within. At the same time rec'd. of them, *Walsh & M'Quinn's* notes for fifteen hundred dollars, one dated the 6th inst. at 60 days, for one thousand dollars, and one dated the 10th inst. for five hundred dollars, being the notes mentioned within."

The plaintiffs then offered to prove by *Boehme*, that at the time of signing the aforesaid agreement, *Walsh* and the defendant agreed to have the houses, mentioned in the said written agreement, finished by the first day of December 1818. To which evidence the defendant objected, and the court allowed the objection. The plaintiffs excepted.

3. The defendant then proved by *Walsh* that he, the witness, and the defendant, had agreed to build several houses on *Franklin-street*, and two houses on *North-street*, in the city of *Baltimore*, on lots which they had agreed to lease of *George* and *Peter Hoffman;* that the defendant applied to the plaintiffs to take an interest in one of the houses to be erected on *Franklin-street*; and the plaintiffs thereupon agreed with the defendant to furnish all the hardware that might be wanted for said buildings about to be erected on *Franklin-street* and *North street*, and to take three-fourths of one of the houses to be built on *Franklin-street*, in payment for the hardware which they were to deliver as aforesaid; that five or six months afterwards, and after some of the hardware had been furnished by the plaintiffs, they, the said *Walsh* and the defendant, declined building

the two houses on *North-street*, and *Walsh*, with the assent of the defendant, informed *Piet*, one of the plaintiffs, that they had so declined, and that this would make no difference to the plaintiffs, as the defendant and *Walsh* would take from them as much hardware as they would have done if they had not declined building the two houses on *North-street;* that *Piet* made no objection; and that the plaintiffs afterwards continued to furnish hardware, which was used on the buildings on *Franklin-street*, and that the said buildings were finished in the month of May 1819, and that the present action was brought to recover the hardware which had been delivered to the defendant under the contract and in the manner before stated. The witness also proved, that the houses on *Franklin-street* were never divided by any particular act, nor was any house ever tendered to the plaintiffs, within his knowledge; but witness heard *Piet*, one of the plaintiffs say, that *Owings*, the other plaintiff, would take no part in the buildings. The defendant had the key of the houses, and the witness did not know that he had ever parted with it. The plaintiff then moved the court to direct the jury, that if they believe this testimony, the plaintiffs were entitled to recover; which direction the court refused to give. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued at the last June term before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and ARCHER, J.

Mitchell and *R. Johnson*, for the Appellants. 1. *John Walsh* was not a competent witness, and ought not to have been admitted.

2. The evidence offered in the *second* bill of exceptions, to prove the time limited for the completion of the houses, should have been received.

3. The agreement, stated in the *third* bill of exceptions, resting only on parol evidence, was within the statute of frauds.

4. If it was not within the statute, still it was not binding on the plaintiffs, as the defendant failed to perform his part of it; and the court should, therefore, have directed the jury, that the plaintiffs were entitled to recover.

5. The account in bar ought not to have been admitted.

1. On the *first point*, they cited *Martin vs. Henrickson*, 2 *Ld. Raym.* 1007. *French vs. Backhouse*, 5 *Burr.* 2727. *Riddle vs. Moss*, 7 *Cranch*, 206. 1 *Phill. Evid.* 48, 73. *Young vs. Bairner*, 1 *Esp. Rep.* 103; and *Birt vs. Hood*, *Ibid* 20.

2. On the *second point*—*Watkins vs. Hodges & Lansdale*, 6 *Harr & Johns.* 38. *Ensign vs. Webster*, 1 *Johns. Cas.* 145. *Keating vs. Price*, *Ibid* 22. *Pleasants vs. Pemberton*, 2 *Dall. Rep.* 196. *Peake's Evid.* 83. *Morton vs. Wells*, 1 *Tyler's Rep.* 382. *The King vs. Inhabitants of Laindon*, 8 *T. R.* 379, 382. 1 *Phill. Evid.* 443, 444, 426, 427, 428, *(note a,)* 429. *Maryland Insurance Company vs. Ruden*, 6 *Cranch*, 338. *Overseers of the Poor, &c. vs. Overseers of the Poor, &c.* 10 *Johns. Rep.* 229. 1 *Bac. Ab.* tit. *Agreement*; and 2 *Phill. Evid.* 45.

3. On the *third point*—1 *Bac. Ab.* tit. *Agreement*, (C,) 115. *Botting vs. Martin*, 1 *Campb.* 318. *Hoby vs. Roebuck*, 2 *Serg. & Low.* 57. *Hawkins vs. Holmes*, 1 *P. Wms.* 770. 1 *Chitty's Plead.* 142, 334, 342. 2 *Phill. Evid.* 63, 64, 65, 82, 83, *(note a;)* and *O'Herliky vs. Hedges*, 1 *Sch. & Lef.* 123, 130.

Moale and *Mayer*, for the Appellee. 1. On the *first* and *third* bills of exceptions they cited 1 *Phill. Evid.* 43, 54. *Ilderton vs. Atkinson*, 7 *T. R.* 476. *York vs. Blott*, 5 *Maule & Selw.* 71. *Peaceable vs. Watson*, 4 *Taunt.* 17. *Shuttleworth vs. Stephens*, 1 *Campb.* 407. *Hudson vs. Robinson*, 4 *Maule & Selw.* 475. *Birt vs. Kershaw*, 2 *East*, 458. *Ridley vs. Taylor*, 13 *East*, 175. *Alderman vs. Tirrell*, 8 *Johns. Rep.* 418. *Birt vs. Hood*, 1 *Esp. Rep.* 20. 2 *Com. Cont.* 72, and *Inman vs. Stamp*, 2 *Serg. & Low.* 273.

2. On the *second* bill of exceptions, they cited *Ham. Dig.* 287, pl. 20, 24, 50, 67, 69, 71, 82. *Rich vs. Jackson*, 4 *Bro. Ch. Rep.* 514. *Hare vs. Sherwood*, 1 *Ves.* 243. *Woollam vs. Hearn*, 7 *Ves.* 211. *Wesley vs. Thomas*, 6 *Harr. & Johns.* 24, 25; and 2 *Com. Cont.* 13, 20, 56, 81, 84.

Curia adv. vult.

STEPHEN, J. at this term, delivered the opinion of the court. This action was instituted for goods sold and delivered. The plaintiffs proved, by competent testimony, the delivery of the goods as charged in their declaration, and there rested their case. The defendant, in his defence against the action, offered to prove by a certain *John Walsh*, that the plaintiffs, together with the defendant and the witness, and others, associated together to build several houses on *Franklin-street* in the city of *Baltimore;* that the plaintiffs had agreed to furnish the hardware necessary for said houses, and for payment thereof were to have an interest of three-fourths in one of said houses, when finished. The plaintiffs objected to the witness, as being incompetent upon the ground of interest, which objection the court overruled; and the question now to be decided is, whether the opinion of the court below was correct in admitting the testimony of said witness? The principle of law is well settled, that any interest, however small, which a witness has in the event of a cause, is sufficient to render him incompetent, and will exclude him from giving testimony in the case. In 1 *Phillips on Evidence*, 53, the law is laid down to be, that a person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune or character, is as incompetent to give evidence, as one who may be interested to the amount of thousands. If then, *John Walsh* had any interest, however small, in the determination of the cause then before the court, he ought to have been rejected as incompetent. He was called to prove that the plaintiffs, the defendant, himself, and others, were jointly concerned in building certain houses on *Franklin-street* in the city of *Baltimore*; and that the articles for which suit was brought, were, by agreement, to be applied to the building of those houses; and that the plaintiffs contracted to take, as compensation for them, an interest in one of the houses. No man has a right to prove himself a partner with another against his consent, for, in 1 *Phillips on Evidence*, 73, (*note c*,) the rule is stated to be, that the admission of one defendant is not evidence to charge another defendant with the fact of being a partner with him; yet in this case he was called upon by the defendant to prove himself a partner with him; and the rule of law being, that every man may renounce a privilege instituted for his protection, so far as the defendant was concerned, his incompetency to prove that fact was removed by a waiver of the objection on his part; but he was certainly not admissible to prove the plaintiffs likewise partners with himself and the defendant in the building of said houses. The witness was clearly interested in the event of the suit against the defendant; because the hardware, for which the action was brought, being used in building the houses on *Franklin-street*, in which he was jointly concerned, he was liable, not only to contribution in the event of a recovery by the plaintiffs, but he was likewise responsible for his proportion of the costs of that suit. In *Riddle vs. Moss*, 7 *Cranch*, 206, it was decided, that an increase of liability by reason of costs, is sufficient to render a witness incompetent.

The judgment of *Baltimore* county court ought to be reversed on the *first* and *third* bills of exceptions; because the witness, who was permitted to give testimony to the jury, was incompetent, and ought to have been rejected. See also *Starkie on Evidence*, 783.

The opinion of the court, expressed in the *second* bill of exceptions, was correct, and is affirmed; because the agreement made between the witness, *Boehme*, and the defendant, the plaintiffs were not bound by, not being a party to the same; and therefore they should not be permitted to avail themselves of it in their favour.

Archer, J. I concur with the court below in the opinions expressed by them in each of the bills of exceptions; and as I therefore dissent from the opinion of this court on the *first* and *third* bill of exceptions, I beg leave briefly to express my views on each question submitted to this court.

The question in the *first* bill of exceptions is as to the admissibility of *John Walsh* as a witness for the defendant, for the purpose of proving the existence of a limited partnership, (it was so considered in the argument,) *between the plaintiffs, defendant, witness, and others.*

Were the plaintiffs *strangers*, suing the defendant as one of a firm, the defendant would not be permitted to call one of his co-partners for the purpose of proving a partnership, inasmuch as the witness, being liable to a contribution for debt and costs to the defendant, has an interest in defeating the action. In such a case the verdict against the defendant would be evidence, not of the existence of the partnership, but that being established, it would be evidence of the amount recovered against the defendant, in an action by such defendant against the witness for a contribution. Whether this principle of the law of evidence is applicable to the present case, and excludes this witness, is the question submitted to the court.

It is conceived that the principle of the rule can have no applicability to this case, for it cannot be perceived how, if there were a recovery against the defendant, he could, under the circumstances of this case, sue the witness for a contribution. In such an action, proof of partnership between the defendant and the witness, would be indispensable to a recovery; and if, as is the fact, it should turn out in evidence, that the recovery, upon which the action for contribution is grounded, was had by one partner's suing one of his co-partners, instead of going into equity to compel an account and adjustment, (the only manner in which he could rightfully have proceeded,) it would be impossible for the defendant in such action to succeed against the witness. If a partnership existed between the plaintiffs and defendant, the plaintiffs had no right to sue the defendant at law, and a recovery against him would be wrongful, for which he could seek redress in a court of equity, and where he could be made responsible to the plaintiffs for no greater sum than, as co-partner with the plaintiffs, he was liable according to the terms of the association, and their mutual dealings. But in such a case, could an action for contribution be maintained, it would be giving a sanction to such wrongful proceeding on the part of the plaintiffs, and would be equivalent to saying that one partner might be compelled to pay another co-partner a greater sum than was due him, without having any regard to their contract or partnership transactions. Be the event of this suit what it may, the situation of the witness remains unchanged. He can be responsible to neither the plaintiffs, nor the defendant, *beyond the terms of the association.* If the plaintiffs fail in their suit, the witness remains, as before, answerable in equity to them. If the plaintiffs succeed, and the defendant, by failing to seek redress in equity, is compelled to pay the sum recovered at law, the only thing which he would have a right to demand would be, that he should, in the distribution of the funds of the association, be put in the place and stead of the plaintiffs, who could rightfully only have claimed an interest in one of the houses on *Franklin-street*, in payment for the hardware delivered; so that the interest of the witness, whether personal or relative, is precisely the same, let the issue of the suit at law be what it may. I therefore conceive he was properly admitted as a witness.

The reason for the introduction of the testimony by the plaintiffs, in the *second* bill of exceptions, it is difficult to apprehend, nor is it distinctly seen why it was considered necessary on the part of the defendant, to resist the testimony proposed in this bill of exceptions to be given. For from any thing which appears in evidence, this contract between the defendant, *Walsh & Boehme*, be its construction what it may, could have had no bearing on the contract attempted to be set up in this case by the defendant, or upon the one attempted to be established by the plaintiffs, without some other testimony connecting it, in some manner, with the contract in issue before the jury. But if the contract was properly in evidence in the cause, it was surely proper that it should appear before the court with the same stipulations, and with the same character impressed upon it, and that the same interpretation should be given to it, although introduced in evidence, which it would have or receive were an action depending upon it by one of the contracting parties against the other. By its terms the contracting parties had fixed *no definite time* for the completion of the buildings on *Franklin-street*. It may therefore be considered that the defendant and *Walsh*, by a just construction of the agreement, had a reasonable time allowed them for that purpose. To permit a verbal agreement, entered into at the time of making the contract, to be set up, by which a *specified time* should be allowed for finishing the houses, would be to admit evidence to vary the contract.

This case may be assimilated to the case of a promissory note, where no time is fixed for payment; and where it has been decided, that evidence would be inadmissible to shew that it was not intended to be paid immediately. Evidence of an agreement to enlarge the time for the delivery of goods sold, has been admitted, on the ground that it was only a continuance of the original contract; but in all these cases, the agreement for the substitution of other days, instead of those originally specified for its performance, were always made subsequent, not at the time of entering into the stipulation. I therefore concur with the court below on the *second* bill of exceptions.

From the testimony detailed in the *third* bill of exceptions, it appears that a special contract was entered into between the plaintiffs and the defendant, whereby the plaintiffs were to receive, in consideration of their delivery of a quantity of hardware, three-fourths of a dwelling-house to be erected on *Franklin-street* in the city of *Baltimore*. Some change in the determination of the defendant, as to the number of houses which he had calculated to build, was made and announced to one of the plaintiffs, who made no objection, and the plaintiffs afterwards continued to furnish more of the goods they had agreed to deliver, and *this action, it is admitted, is brought to recover the hardware delivered under the contract.* The same quantity of hardware was agreed to be taken as if no alteration had been made in the determination of the defendant. It appears, therefore, to be an alteration in no wise affecting the plaintiffs, or touching the contract between the parties. The rule relative to a party's right to abandon the special agreement, and resort to the implied contract, is this, that if the special agreement has been put an end to by the defendant, or the performance of it on the part of the plaintiff prevented by some act of the defendant, there the plaintiff may recover under the common counts whatever may be due to him. But if the special agreement still continue in force and unrescinded, the plaintiff's remedy must be on the special contract, and he cannot abandon it, and recur to the implied contract. Now the special agreement has neither been put an end to, nor its performance prevented by the defendant. The plaintiffs surely cannot be permitted to recover, in this action, the value of the hardware delivered, and thereby waive their contract with the defendant. They agree to take, in satisfaction of their goods, part of a dwelling-house, and can only have their remedy for a specific performance of the contract, or by an action on the special contract, in which they should recover damages for the failure of the defendant to execute it.

If this were an agreement within the statute of frauds, as seems to have been conceded in the argument, it was nevertheless one, the performance of which could have been enforced against the defendant, because the plaintiffs had furnished the hardware in pursuance of it, with which the defendant had erected various buildings. It has been performed on the part of the plaintiffs, and it would be impossible to restore them to their former situation; therefore, if it were allowable for the defendant to take advantage of the statute, it would enable him to perpetrate a gross fraud on the plaintiffs. Performance on the one side, under such circumstances, has always been considered as taking a case without the provisions of the statute. But if it were a case not excepted by judicial decisions from the operation of the statute of frauds, still it would have been incumbent on the plaintiffs to have satisfied the court, that the defendant refused to perform the contract, or that he had taken advantage of the statute, before they could be entitled to sue on the general counts. I concur with the court below in the *third* bill of exceptions, and think their judgment ought to be affirmed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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Gist's Adm'r. *D. B. N. cum. test. an. vs.* Cockey & Fendall.—June, 1826.

Where an action is brought against an executor or original administrator, and pending it he dies, the administrator *de bonis non* may, under the act of 1785, *ch.* 80, be made a party.

Accounts settled by executors or administrators in the orphans court, are *prima facie* evidence to shew the situation of the personal estate of the deceased, in all controversies between the executor or administrator and the representatives of the deceased, and in actions by creditors against the heirs or devisees of the deceased, and to warrant a sale of the real estate by decree of the court of chancery. But such accounts are not evidence at all of over payments by executors or administrators, or that the claims stated in them were debts justly due by the deceased, and chargeable upon his real assets, either at law or in equity.

If after exhausting the personal assets, an executor or administrator does pay debts of the deceased out of his own funds, he has a right only to be substituted in the place of the creditors, and must establish his claim by the same kind of testimony which would be demanded of them.

A simple contract creditor of a deceased, cannot in this state charge his devisee *solely* on the ground that real assets have come to his hands.

And where a devisee expressly promises to pay such a debt, the promise is *nudum pactum*, unless real assets have come into his hands; and where assets have come, such a creditor can only recover in an action against the devisee, by proving the debt, and proving the value of the assets.

Unless bills of exceptions refer to each other they are to be considered as wholly distinct.

APPEAL from *Baltimore* County Court. *Assumpsit*, brought by the appellees against the appellant. The facts of the case, as set forth in the bills of exceptions taken at the trial by the defendant below, are sufficiently stated by the Judge who delivered the opinion of this Court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Heath and *R. Johnson*, for the Appellant. 1. On the *first* bill of exceptions, they contended, that the accounts of an executor or administrator, settled by him with the orphans court, are not evidence for him to prove that the estate was overpaid, so as to charge a legatee or devisee with the amount so overpaid.

2. On the *second* bill of exceptions they contended—1. That the declaration made by *P. D. Gist*, in her lifetime, that she was indebted to *Fendall*, (one of the plaintiffs below,) on account of her brother, *T. D. Cockey's* estate, and that she was endeavouring to raise money to pay it, &c. was not an acknowledgment or promise to pay him, and not sufficient to support this action. 2. That such a declaration, where no sum of money is mentioned, cannot amount to, or be considered as, a binding promise. 3. That if it was a promise to *Fendall* it did not authorise the plaintiffs to maintain the action, it not being proved that they were partners. 4. That no such action as this can be maintained against a devisee, without a previous request, and an express promise to pay. This was a voluntary payment made by the plaintiffs. 5. That there was nothing in this *second* bill of exceptions which can connect it with the *first*.

3. They also contended, that the executor of *P. D. Gist*, having died pending the action against him, her administrator *de bonis non* could not legally be made a party to it.

On the *first* bill of exceptions, they referred to the act of 1798, *ch.* 101, *sub ch.* 8, *s.* 10, 13, 15, 16; and *Carnan vs. Turner*, 6 *Harr. & Johns.* 65

On the *third point* in the *second* bill of exceptions, they cited *Graham vs. Robertson*, 2 *T. R.* 282. *Osborne vs. Harper*, 5 *East*, 226. *Brand vs. Boulcott*, 3 *Bos. & Pull.* 235. On the *fourth point*—*Child vs. Morley*, 8 *T. R.* 613. *Wilson vs. Knubley*, 7 *East*, 134. On the *fifth point*—1 *Bac. Ab.* 528.

As to the right to make the administrator *de bonis non* a party, they referred to the acts of 1785, *ch.* 80, *s.* 1, and 1798, *ch.* 101, *sub ch.* 14, *s.* 4.

Scott and *Taney*, for the Appellees. 1. An action of *assumpsit* may be maintained in the names of two persons, without showing them to be partners. *Richardson's adm'x. vs. Stansbury*, 4 *Harr. & Johns.* 275.

2. The administrator *de bonis non* may be made a party, where the executor of the defendant dies pending the action against him. Acts of 1785, *ch.* 80, *s.* 1; 1798, *ch.* 101, *sub ch.* 14, *s.* 4; and 1815, *ch.* 149, *s.* 4. 6 *Bac Ab.* tit. *Statute*, (4) 383, 389.

3. An action of *assumpsit* may be sustained against a legatee or devisee, without showing a previous request, and promise to pay. 1 *Com. Dig.* 187, 195, 196, 200.

4. The *assumpsit* by *P. D. Gist* will enable the plaintiffs to support this action, *Ott. vs. Chapline*, 3 *Harr. & M'Hen.* 323. *Carnan vs. Turner*, 6 *Harr. & Johns.* 65. 1 *Harr. Ent.* 369.

5. The accounts settled in the orphans court by an executor or administrator, showing that he had overpaid the estate, are sufficient evidence to charge the devisee. *Scott vs. Dorsey*, 1 *Harr. & Johns.* 232.

DORSEY, J. delivered the opinion of the Court. This was an action of *general indebitatus assumpsit*, (on promises made by *Penelope D. Gist* in her lifetime,) for money paid, laid out and expended, money lent and advanced, and money had and received, instituted by *Ann Cockey* and *Edward Fendall*, the appellees, against *Joshua F. Cockey*, executor of *Pe-*

nelope D. Gist. The executor dying pending the suit, *Joshua F. Cockey,* (the appellant,) obtained letters *de bonis non* on *P. D. Gist's* estate, and was made a defendant in the usual way. He pleaded *non assumpsit,* and the *act of limitations;* and the judgment of the court below was rendered against him.

Two bills of exceptions were taken at the trial; the *first,* stating that the plaintiffs offered in evidence to the jury, that on the 20th of May 1811, a certain *Thomas Deye Cockey,* of *Baltimore* county, deceased, being then seized and possessed of a large and valuable real estate, by his last will and testament, duly executed, devised the whole of his real estate to the said *Penelope Deye Gist,* and appointed her, and her husband, executor and executrix of his said last will, and died, leaving his will unrevoked, which was proved according to law. That said husband and wife refusing to take out letters testamentary, administration was granted by the orphans court of *Baltimore* county, in due form, to the appellees, who assumed upon themselves the burthen thereof. That *Thomas Gist,* the husband of *Penelope,* departed this life soon after the death of *Thomas D. Cockey,* "and that the said *Penelope D. Gist* took possession of, and sold a part of the real estate, so devised to her as aforesaid; and that the proceeds of the said real estate, so sold, were paid over by the said *Penelope D. Gist* to the plaintiffs, and by them expended in the payment of the debts of their testator." That the plaintiffs further offered in evidence their accounts, settled as administrators aforesaid with the orphans court of *Baltimore* county, to prove that they had paid debts due by the deceased *Thomas D. Cockey,* to an amount, exceeding the estate which came to their hands, by the sum of $1,230 14; for the recovery of which this action was prosecuted. To the admission of which evidence the defendant by his counsel objected; but the court overruled the objection, and permitted the testimony to go to the jury.

The *second* bill of exception states, that "the plaintiffs, in order to support the issue on their part, and prove the promises laid in the declaration, gave in evidence to the jury, by *Anderson Warfield,* a witness produced, that he applied to Mrs. *Penelope D. Gist* to purchase a piece of land in *Anne-Arundel* county, devised to her by the said *Thomas D. Cockey;* she referred him to *Edward Fendall,* and said she would be bound by any bargain he might make. That he accordingly bargained with said *Fendall,* and afterwards paid a part of said purchase money to said *Penelope,* and obtained a deed, and gave her his note for the balance; and afterwards paid a part of that note to *William M'Mechen,* and a part to said *Edward Fendall.* And offered in evidence by Mrs. *Norman,* that a short time before the death of said *Penelope,* witness asked her to make a present to her niece Miss *Cockey;* she said she was indebted to *Edward Fendall* on account of her brother *Thomas D. Cockey's* estate, and she was endeavouring to raise money to pay it; and as soon as it was paid she would make a present to Miss *Cockey.* Whereupon the defendant, by his counsel, moved the court to direct the jury, that upon the evidence so given, the plaintiffs are not entitled to recover in this action." Which direction the court refused to give.

Many grounds, in the progress of the argument, have been urged by the defendant's counsel for the reversal of this judgment. And first, it is contended that the proceedings in the court below are erroneous, and the suit abated for want of a proper defendant to the action, there being, as is alleged, no provision of law warranting the appearance of an administrator *de bonis non,* as a defendant to an action commenced against an executor or original administrator. The clause in the act of 1785, *ch.* 80, *s.* 1, on which this question arises, is this—"that no action brought, or to be brought, in any court of law in this state, shall abate by the death of either of the parties to such action; but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued, and the heir, devisee, executor or administrator, of the defendant, as the case may be, *or other person interested on the part of the defendant,* may appear to such action." The intention of the legislature is so clear, their command so positive, that no suit shall abate by the death of any defendant, but that the same shall be continued, and proper parties made "*toties quoties,*" until a trial or judgment, that this court are bound to give, if necessary, the most extended and liberal construction to this legislative provision to effectuate its object. But the occasion demands not such an interpretation.

The words, "or other person interested on the part of the defendant," most manifestly embrace this and all similar cases; and it is difficult to imagine for what other purpose that expression was introduced into the law. In this opinion the court have adopted the uniform construction given to this part of the act of assembly, from the time of its passage till the argument of this case. The judgment of the county court, therefore, stands unimpeached by this objection.

The next question arises on the *first* bill of exceptions. Were the accounts passed by the appellees with the orphans court, in the manner stated in that exception, admissible as evidence before the jury, for the purpose for which they were offered? We think they were not; no sufficient foundation being laid for such a departure from the ordinary rules of evidence. Such accounts are always received as *prima facie* evidence, to shew that the whole personal estate has been, or has not been, exhausted in the due course of administration, in all controversies between executors, administrators, and the representatives of the deceased; and to the same extent are competent testimony in this and similar actions, by creditors, against the heirs or devisees of deceased persons, and to warrant a sale of real estate by decree of the court of chancery for the payment of debts; and consequently, to shew that an heir or devisee, by an express promise to pay, may be bound in an action of *assumpsit* by a creditor of the deceased. These accounts are not *prima evidence*, or any evidence at all, of overpayments made by executors or administrators, or that the claims stated in such accounts were debts justly due by the deceased, and chargeable upon his real assets, either at law or in equity. If the contrary principle were to prevail, heirs and devisees would be completely at the mercy of executors and administrators, who would, in fact, administer as well the real as the personal assets. By the rules of law prescribed for the government of their conduct, they are only authorised and required to pay the debts of the deceased out of the personal estate; and if transcending the limits of their duty, they see fit to pay, with their own means, all they can reasonably ask or expect either upon principles of law or equity, is, that they be substituted to all the rights of the creditors whose demands they have liquidated. It hence necessarily follows, that such claims must be established against the heir or devisee, by the same kind of testimony which might be demanded of the original creditors themselves.

In considering the *second* bill of exceptions, it may not be amiss to advert to the character of the parties to the case before us. It is not an action of *assumpsit*, brought by a simple contract creditor of the deceased against the devisee, seeking to charge him, solely on the ground that real assets have come to his hands, if it were, the appellees must of necessity fail, as no such action can be sustained in this state. *Preston vs. Preston*, 1 *Harr. & Johns.* 366, and *Lodge et al. vs. Murray's heir and devisee*, 1 *Harr. & Johns.* 499. Nor is it such an action, between such parties, founded on an express promise to pay by the devisee. But suppose it were, what must the plaintiff prove to entitle him to recover? In the first place his original debt or cause of action. The accounts from the orphans court, (the only evidence offered for that purpose,) being rejected by the court's opinion on the *first* bill of exceptions, the plaintiffs must be defeated on that ground. The plaintiffs in this action, if an express promise were proved, are in precisely the same condition with such a plaintiff.

Let us, however, concede that the plaintiffs' cause of action, as far as relates to the debt originally due, is fully established, and that the testimony offered in the *first* bill of exceptions be incorporated in the *second*, are the plaintiffs then in a condition to obtain a verdict? Assuredly not. Before the jury can find for the plaintiffs, it must be shewn that real assets came to the hands of *Penelope D. Gist*, with which she is under a legal or moral obligation to satisfy the debt sought to be recovered; otherwise the promise to pay is a *nudum pactum*, to be enforced neither at law nor in equity. The evidence as to such assets is looked for in vain in the record. It is indeed, in proof, that *Thomas D. Cockey* was, when he executed his will, seized of a large real estate; but that he continued so until his death, or that the devisee was afterwards seized or possessed thereof, is no where alleged. The only evidence on this subject is, that she took possession of, and sold part of said real estate, and paid the proceeds thereof to the plaintiffs; and the statement of the purchase made by *Anderson Warfield*, who leaves us nothing by which we can even conjecture whether his purchase were to the amount of ten dollars, or ten thousand dollars. In the absence of all proof as to the quantum of real assets with which it was attempted to charge the defendant, the jury were incompetent to give a verdict for the plaintiffs.

In the view which has been taken of this case, the court have considered it as if the evidence offered in the *first* bill of exceptions were ingrafted with that contained in the *second*, and that the prayer thereon was upon all the evidence offered in the cause. But they are not warranted in so doing. The bills of exceptions are destitute of the usual words of connexion, and contain none of similar import by which they may be connected. It does not appear, with any thing like legal certainty, which exception was first tendered or signed. The court, therefore, can judicially only recognize them as separate and distinct bills of exceptions, wholly unconnected as to the facts they contain, and the prayers and the opinions predicated upon them. In this point of view the *second* bill of exceptions would present the case of a creditor of the deceased seeking to recover against a devisee in the absence of all evidence of an original debt, or that any amount of real assets ever came to his hands; and that recovery to be had too upon an inferential promise to pay, to be drawn from loose and inconclusive testimony.

The court dissent from the opinions given by the court below on both bills of exceptions.

JUDGMENT REVERSED.

* * *

ROGERS, *et al.* LESSEE, *vs.* MOORE.—June, 1826.

The beginning of a tract of land called *C*, was described in the patent to be "at a bounded red oak, standing 19 perches to the S. of the main road, and *at the end of the first line of a tract of land called M*"—*Held*, that the call to begin the tract *C*, at the end of the first line of the tract *M*, was not an imperative one; and that the jury were not bound to find the tree called for to be at the end of that line, but might find it to be elsewhere, according to the proof.

APPEAL from *Baltimore* County Court. Ejectment for a tract of land called *Orange*. Defence was taken on warrant, and plots were returned, by which it appeared that the defendant took defence for *Carter's Delight.* Plea, *non cul.* and issue.

At the trial the plaintiff, (the appellant,) read in evidence the patent of *Orange,* granted the 31st of October 1751, to *Charles Carroll,* of *Annapolis,* and others, one of the courses of which is described as bounding on *Copus's Harbour,* and running thence reversely N. W. by N. 40 perches, until it intersects the given line of *Mounteney's Neck,* then reversing the given line, &c. The plaintiff then deduced a title in fee simple in said land, from the patentees, by sundry mesne conveyances, wills, and descents to the several persons, who on the 26th of January 1816, constituted and were called *The Baltimore Company.* He also read in evidence an act of the assembly of this state, passed the 26th of January 1816, entitled, "An act for the relief of *The Baltimore Company,*" (1815, *ch.* 147,) vesting in the lessors of the plaintiff all the lands which belonged to that Company, and had been sold by them, but not conveyed, and all lands that then remained unsold and undivided; in trust, &c. He also gave in evidence the plots and explanations in the cause, and proved that *Orange* was truly located by him on said plots, and that the part thereof laid down on said plots as his claim and pretensions, remained undivided and unsold by the *Baltimore Company* on the 16th of January 1816, and included the land for which the defendant took defence. The defendant then gave in evidence the patent of a tract called *Carter's Delight,* granted the 10th of December 1717, to *John Carter,* "beginning at a bounded red oak standing nineteen perches to the southward of the main road, and at the end of the first line of a tract of land called *Mountainess,* and running from the said tree north sixty perches, then," &c. containing 100 acres. And to prove that *Carter's Delight* was truly located by him on the plots, as his defence, beginning at or near to the place designated by the letter red A, on the plots, he read in evidence the patent of a tract of land called *Fell's Prospect,* granted *Edward Fell* the 20th of May 1761, being a resurvey on several older tracts. And also gave in evidence, to support his said location, certain deeds executed by *The Baltimore Company,* for whose use this action was brought, of lots No. 40, 41, 78 & 79, being parts of *Orange*, the younger, to the different purchasers of the same at public auction in 1792. And for the same purpose gave in evidence a deed from *Thomas Sligh* to *John Bond*, for 10½ acres of land, being part of a tract called *Mounteney's Neck;* and proved that the locust post, mentioned in the said deed, stood at the place designated on the plots by a small black circle, near to red A. And he also gave in evidence, by consent of the plaintiff, the petition, commission and depositions, under a land commission, taken out by *William Carter* on the 4th of March 1735; and the petition, commission and depositions, under a land commission taken out by *William Fell*, in December 1742; and also gave in evidence, with the consent of the plaintiff, subject to all just exceptions to the competency and relevancy of the matters therein contained, the depositions of *Adam Clackner, James Baker, E. Smith, John Murray, James Baker, Pamelia Moore, Hugh Stewart, John Mycroft, John H. Barney, William Evans* and *Adam Clackner*, all taken in this cause. The plaintiff then, to prove that *Carter's Delight* was correctly located by him on the plots beginning at the black letter A, and that the defendant's location of that tract could not be sustained, read in evidence the certificate of *Mounteney's Neck*, surveyed for *Alexander Mounteney* on the 31st of March 1662; and also the patent of the said land, granted to the said *Mounteney* on the 30th of June 1663; and proved that *Mounteney's Neck* was truly located by him on the plots, beginning at black B, and terminating its first line at black A. And also gave in evidence, for the purpose aforesaid, the warrant of survey granted to *John Carter* on the 29th of July 1714, on which the survey of *Carter's Delight* was made; and also, the certificate of survey of the said tract made and returned under the said warrant, dated the 11th of August 1714, and the certificate returned on the 27th of April 1737, for *William Fell*, of *Mounteney's Neck*, as escheat, and the patent thereon granted to said *Fell*, on the 12th of July 1737. He also gave in evidence, for the same purpose, a deed from *William Carter* to *William Fell*, for *Carter's Delight*, dated the 28th of February 1740, and the depositions of *William Bond* and of *James Baker*, dated in August 1824, and the petition of

William Carter, above named, of the 4th of March 1735, for a commission on *Carter's Delight* aforesaid. And also gave in evidence, that the white oak tree called for in the original certificate and patent of *Mounteney's Neck*, as the second boundary of that tract, and the red oak tree called for in the escheat certificate and patent of *Mounteney's Neck*, as the second boundary of the said escheat land, and the red oak called for in the certificate and patent of *Carter's Delight* as its beginning, have all long since disappeared, and been wholly lost. The plaintiff then proved by *Jehu Boulden* and *Ephraim Smith*, witnesses in the cause, that the beginning and termination of the first line of *Mounteney's Neck* was as the plaintiff located the same on the plots; and read in evidence the certificate and patent of the tract of land called *Copus's Harbour*, or *Corpus Harbour*, and the certificate and patent of *Carter's Delight;* also the aforesaid deed from *William Carter* to *William Fell*, and the aforesaid deed from *Sligh* to *Bond*, together with the plots in the cause, to prove that *Mounteney's Neck* was called sometimes by that name, at other times by the name or description of a parcel of land laid out for *Alexander Mounteney*, at other times *Mountainess*, and also as land originally granted to *Alexander Mounteney*, and to prove that the land, so differently called, was one and the same tract of land. He then proved, that *Edward Fell*, patentee of *Fell's Prospect*, was the son and heir at law of *William Fell*, mentioned in the escheat certificate and patent of *Mounteney's Neck* aforesaid, and in the said deed from *William Carter* to *William Fell*. The defendant then prayed the court to direct the jury, that if the jury found from the evidence that the red oak called for in the patent of *Carter's Delight*, as the beginning of the said tract of land, stood at the point designated on the plots as red A, then *Carter's Delight* must be located from that point, according to the courses, distances and calls, contained in the grant, with such allowance for variation of the compass as the jury, upon the evidence, might think right to allow, and that the jury were not bound to begin the said tract at the end of the first line of *Mounteney's Neck*. The plaintiff objected to the directions so prayed by the defendant, and to the relevancy of the testimony so given by him, and prayed the court for the following instructions to the jury: *First.* That there is no evidence in this cause of the existence at any time of a red oak at or near to either of the places represented by the red letters A or B, on the plots. *Second.* That as the certificate and patent of *Mounteney's Neck,* called for a white oak at the end of its first line, it follows that the call in *Carter's Delight* to begin at a red oak standing at the end of that line, where no red oak could have stood, is a mistake so far as relates to the tree, which must be corrected by rejecting that part of the call. *Third.* That as the certificate and patent of *Carter's Delight* call for a red oak at the end of the first line of *Mounteney's Neck,* no evidence can be received to show the existence of such a beginning tree at the place designated by the red letters A or B, on the plot, at the distance of two hundred and sixty perches from the end of that line. *Fourth.* That the true location of *Carter's Delight* is to begin its first line at the end of the first line of *Mounteney's Neck,* wherever the jury may find it to be, and to run course and distance for all its subsequent lines, with such allowance for variation as they may find to be correct. But the Court, [*Archer,* Ch. J.] admitted the evidence so offered by the defendant, and gave the directions prayed by him, and refused to give those prayed by the plaintiff. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, and Dorsey, J.

Magruder, for the Appellant, referred to *Helms's Lessee vs. Howard,* 2 *Harr. & M'Hen.* 84, per *Harrison* Ch. J. & *Carroll, et al. Lessee vs. Norwood,* 5 *Harr. & Johns.* 163.

Taney and *Rogers,* for the Appellee, cited *Hammond vs. Ridgely's Lessee,* 5 *Harr. & Johns.* 245; and *Pennington vs. Bordley's Lessee,* 4 *Harr. & Johns.* 450.

Stephen, J. delivered the opinion of the court. The sole question in this case is as to the beginning of the tract of land called *Carter's Delight,* which is stated in the patent to begin "at a bounded red oak, standing nineteen perches to the south of the main road, and at the end of the first line of a tract of land called *Mountainess,*" which tract is sometimes called *Mounteney's Neck.* The appellant contends that the call is an imperative one, and that *Carter's Delight* must begin at the end of that line, and that the jury are not at liberty to find from the evidence, the true beginning of that tract at any other place, although they should find the tree called for not to stand at the end of the first line of the tract of land called *Mountainess,* as expressed in the patent. The question here presented for the consideration of the court is not now open for discussion, but has long since been put to rest by several solemn adjudications of this tribunal. In the case of *Carroll, et al. Lessee vs. Norwood,* 5 *Harr. & Johns.* 155, after affirming the right and jurisdiction of the court to decide on the construction of grants and deeds, the court go on and declare it to be the exclusive right and province of the jury to ascertain and fix calls according to the evidence legally admissible for that purpose. So in the case of *Rench vs. Beltzhoover,* 3 *Harr. & Johns.* 469, the court express themselves in the following terms: "The court are of opinion, that it exclusively belongs to the power and jurisdiction of the court to determine on the true construction and operation of grants, and whether a call in a certificate of survey is to be gratified or not, and in what manner; and that it exclusively appertains to the province of the jury to find facts, and ascertain the true place or point called for, according to evidence legally admissible by the court." There are other decisions of this court establishing the same principles, particularly the case of *Pennington vs. Bordley, et al. Lessee,* 4 *Harr. & Johns.* 450 So that the relative power and jurisdiction of the court and the jury upon this subject may now be considered as solemnly settled.

The court are therefore of opinion, that the jury were not bound to find the tree called for at the end of the first line of the tract of land called *Mountainess.*

JUDGMENT AFFIRMED.

COALE *vs.* HARRINGTON.—June, 1826.

A bill of sale of all the personal estate of the grantor passes whatever estate then belonged to him, and parol evidence is admissible to shew what that estate was.

Where it did not appear by the acknowledgment of a bill of sale before a justice of the peace, whether it was made by the grantor, or by whom it was made—*Held*, that such acknowledgment was defective, and that the bill of sale could not be recorded so as to make an authenticated copy of it evidence.

An authenticated copy of an instrument, improperly admitted to record, or not required to be recorded, is not competent evidence.

The act of 1763, *ch.* 13, requiring deeds of gift of slaves to be recorded only where the donors retain possession, a copy of such a deed, the original of which had been recorded, where the possession passed out of the donor at its execution, would not be evidence.

It is no error in an inferior court to refuse to give an opinion on an abstract proposition.

In an action of *Trover*, for slaves, in which the plaintiff claimed title under a bill of sale from F, the former owner, and the defence was, that F had afterwards manumitted them—*Held*, that the declarations of F, made between the date of the bill of sale, and the deed of manumission, that he had sold the slaves to the person under whom the plaintiff claimed, was competent evidence for the plaintiff.

Where the appellate court differ with the inferior court upon one of the defendant's bills of exceptions, and agree with them upon the rest, they will still affirm the judgment, if they think the merits of the case are against the defendant, and that there is proof properly received to enable the plaintiff to sustain his action.

APPEAL from *Baltimore* County Court. Trover for three slaves named *Julian, Alexander* and *Commodore*. Plea, *non cul.* and issue.

1. The plaintiff, (now appellee) produced and offered to read in evidence, at the trial, an authenticated copy of a bill of sale, taken from the records of *Queen Anne's* county, executed by *John Deford*, of *Queen Anne's* county, to *Thomas L. Deford*, dated the 12th of May 1806, and recorded in the records of the said county on the same day, whereby the said *John Deford*, in consideration of the sum of $400, granted, bargained and sold, unto the said *Thomas L.* his executors, &c. *all his personal estate of whatever kind or description*. The bill of sale was thus acknowledged: "*Maryland, Queen Anne's* county, to wit. On this twelfth day of May 1806, personally appeared before me, the subscriber, one of the justices of the

peace for the county aforesaid, and acknowledges the within writing to be his act and deed, according to the true intent and meaning thereof, and the act of assembly in such case made and provided. *William B. Hackett.*"

He also produced, and offered to read in evidence, an authenticated copy of another bill of sale from *Thomas L. Deford* to *Mary Ann Deford*, dated the 10th of April 1812, and recorded in the records of the county in which the grantor resided, the 20th of the same month, whereby *Thomas L. Deford*, in consideration of natural love and affection, &c. did give, grant and confirm, unto his granddaughter, *Mary Ann Deford*, daughter of his son *John Deford*, a negro woman called *Henny*, and her infant child called *Julian*. This bill of sale was duly acknowledged by *Thomas L. Deford*, on the 10th of April 1812. He also produced and read in evidence, with the consent of the defendant, (the appellant,) the depositions of *Charles Copper* and *Samuel N. Copper*, taken on the 7th of November 1823, before a justice of the peace, &c. *Charles Copper* deposed, "that *John Deford* owned a negro woman named *Henny*, which *Deford* told deponent he had sold, her and her child named *Julian*, with other property, to his father *Thomas L. Deford*. After this conversation, *John Deford* lived with deponent, and never had possession of said *Henny*, or her child, during *Thomas L. Deford's* life. *Henny* at this time had but one child named *Julian*. Deponent knows that the wife of the plaintiff is the daughter of *John Deford*, and the granddaughter of *Thomas L. Deford*, and her name was, before marriage, *Mary Ann Deford*. After *Henny* and her child became the property of *Mary Ann Deford*, *Henny* had two children, the eldest named *Alick* or *Alexander*, the other named *Commodore*. *Alick* was yellow, *Commodore* black. *John Deford* had possession of the children a short time before they came to *Baltimore*, and said he kept them for his daughter, to whom they had been given by her grandfather. *John Deford* was opposed to Mr. *Harrington* marrying his daughter, and said *Harrington* should not have the negroes if he could keep them from him. *Harrington* was married about three years last August or September. *John Deford*, being the father of Mrs. *Harrington*, acted as guardian for her, as deponent knows.

Every body considered these negroes as the property of Mrs. *Harrington*, after *Thomas L. Deford's* death, and *John Deford* frequently boasted of his daughter's fortune in these negroes. Deponent saw *Alick* living with *Harrington*, but does not know that the other negroes were ever in his possession. *Alick* lived with *Harrington* some weeks—does not know that it was a month. *Alick* did not like to stay, and deponent believes he run away; but does not know it. *John Deford* said, if *Harrington* would be quiet, his intention was to let him have one of the negroes." *Samuel N. Copper* deposed, "that he knows that *Thomas L. Deford*, being the owner of, and in possession of the negro woman *Henny*, and her child *Julian*, the subjects of controversy in this cause, executed a bill of sale of them to his granddaughter, *Mary Ann Deford*, the now wife of the plaintiff, about the year 1811 or 1812; that after such transfer *Henny* had two children, *Alick* and *Commodore*. *Alick*, or *Alexander*, was yellow, and *Commodore* black. *John Deford* denied being the owner of these negroes, and deponent paid the direct tax assessed on them to prevent their being sold—*Mary Ann Deford*, the owner, being then a minor, and living with her mother's connexions. Deponent saw *Alick* for some time in *Harrington's* possession in the fall of 1820 or 1821. The children, except the girl, were off and on in the possession of *Harrington* after he married Miss *Mary Ann Deford*. They were married in August or September 1820. *John Deford* always said the property was his daughter's." The plaintiff further offered in evidence, by *Abraham Hays*, a competent witness, that he procured a letter to be written to the plaintiff, whom he had never seen at that time, directed to the *Eastern Shore*, where witness understood said plaintiff resided, informing him that there was a negro woman of his in *Baltimore*. That some time after, a person came to *Baltimore*, calling himself *Richard Harrington*, and saying that he had come to *Baltimore* in consequence of a letter he had received from witness, in search of the negro woman mentioned in the letter; that witness then went with said *Harrington*, and succeeded in finding said woman, and *Harrington* soon after sold her to one *Anderson*. That witness afterwards went with *Harrington* to the defendant to demand the negro children, who are the subjects of this action, and who witness understood were the children of the said negro woman. And that on *Harrington's* making said demand of the defendant, the defendant refused to give them up to *Harrington*, saying he should not have them without legal process, for he would punish *Harrington* for selling the mother of said negro children to *Georgia*. The defendant did not deny that *Harrington* was the person he represented himself to be. That the witness then went with the person aforesaid, to *John Glenn*, Esquire, an attorney at law in *Baltimore*. And it was admitted that *Glenn*, at the instance and request of said person calling himself *Harrington*, instituted the present suit in the name of said *Harrington*. The defendant then proved that *John Deford*, claiming to be the owner of the negroes named in the declaration, brought them with him in the steam boat to *Baltimore*, a few days before this action was brought; and offered evidence to prove, that the said *Deford* applied to the defendant, and requested him to take possession of the said negroes, alleging that they were his, and that the plaintiff was attempting to get possession of them for the purpose of selling them; and that the defendant took possession of them accordingly. He further offered evidence to prove, that *Henny*, the mother of the negroes in question, about the year 1812, and for some years after, lived in *Centreville*, and hired herself about, in different places, as a free woman. That some persons threatened to enforce the law against masters who suffered their slaves to go at large as free. That *John Deford* reclaimed *Henny*, and he, or his son for him, hired her to Mr. *Champlin*, in *Centreville*. He further offered evidence to prove, that *Henny* was always considered, in the neighbourhood where *John Deford* lived, as the property of said *Deford*. That this was the general reputation in the neighbourhood. That *Henny* was always called *Deford's Henny*—the said *Thomas L. Deford* being then dead. He further offered evidence to prove, that neither *Henny*, nor her children, were ever in the possession of the plaintiff until after 1820, when the defendant got possession of *Henny*, and sold her to a *Georgia* negro trader. That *John Deford* repeatedly declared that *Henny*, and her children, were his; that he bought them of a Mr. *Wilmer*, after the date of his said bill of sale of 1806, to *Thomas L. Deford*, his father. The defendant then offered in evidence a deed of manumission, executed by *John Deford*, for the three negro children mentioned in the declaration, and dated the 18th of September 1821, whereby the said *Deford*, stating himself to be of the city of *Baltimore*, manumitted and set free his negro girl *Julian*, aged about ten years, his negro boy *Alexander*, aged about eight years, and his negro boy *Philip Commodore*, aged about four years, and giving to them immediate freedom. The deed was acknowledged by him on the same day before the defendant, being a justice of the peace of *Baltimore* county, and recorded the same day among the records of that county. It was admitted that the defendant, at the time he took possession of the negroes, was a justice of the peace tor *Baltimore* county, and that he put one of them into the possession of a Mr. *Tyson*, another into the possession of an uncle of the child, and the third into the possession of one *Cowman;* and that neither the defendant, nor any of the said persons to whom he delivered the said three negroes, have ever claimed any right or title to them, but have always, since the date of the said deed of manumission, declared them to be free. The defendant then prayed the court to instruct the jury, that the aforesaid copy of the bill of sale from *John Deford* to *Thomas L. Deford*, was not a legal and valid bill of sale for the purpose of conveying a title to negro *Henny*, or her children, from the said grantor to the grantee. Which instruction the Court, [*Archer*, Ch. J.] refused to give. The defendant excepted.

2. The defendant further prayed the court to instruct the jury, that if they should believe from the evidence, that *Thomas L. Deford*, at the time he executed the said bill of sale to *Mary Ann Deford*, his granddaughter, did not retain the use and possession of the said negro *Henny*, and her children, mentioned in the said bill of sale to said *Mary Ann Deford*, then the copy of the said bill of sale, offered in evidence to the jury, was not legal evidence, and did not prove that the title to the said negroes passed from the said *Thomas L. Deford* to the said *Mary Ann Deford*. This instruction the court also refused to give. The defendant excepted.

3. The defendant further prayed the court to instruct the jury, that if they should believe, that when the demand was made upon the defendant for the delivery of the negroes, for which this suit was instituted, the defendant assigned as a reason for the nondelivery that he did not know that the plaintiff was the owner, or that he refused to deliver them upon the ground that he did not know to whom they belonged, and that he therefore kept them until the right should be ascertained, then the demand and refusal stated in the preceding bill of exceptions, is no evidence of conversion, unless the defendant has since sold, or otherwise converted the said negroes to his use; and that the jury must find a verdict for the defendant. This direction the court gave. The plaintiff excepted.

4. The defendant further prayed the court to instruct the jury, that upon the whole of the evidence, the plaintiff was not entitled to recover. Which instruction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Raymond, for the Appellant, contended, 1. That the bill of sale from *John Deford* to *Thomas L. Deford*, a copy of which was given in evidence, was a void instrument, and conveyed no title. It was general for all his personal estate, of whatever kind or description. To show, therefore, what property passed, parol evidence must be gone into, and such evidence was not admissible, because it varied the written contract. *Wain vs. Warlters*, 5 *East*, 10. *Batturs vs. Sellers & Patterson*, 6 *Harr. & Johns.* 249.

2. That it was not duly acknowledged by *John Deford*, and therefore that a copy was improperly admitted in evidence. That it could not be presumed, it not being so stated, that *John Deford* acknowledged it, and unless he did, it was not a valid instrument.

3. That the parol evidence offered by the plaintiff below in explanation of the bill of sale, to show what negroes passed under it, was illegal, and ought not, therefore, to have been re-

ceived by the court. The hearsay evidence of *John Deford*, who was not proved to be dead, though whether alive or dead would make no difference, was admitted by the court. If he was a competent witness he ought to have been produced at the trial, or his testimony legally taken.

4. That a copy of a bill of sale was not legal evidence, except where the grantor retains possession of the property sold. *Dorsey vs. Gassaway*, 2 *Harr. & Johns.* 402.

R. Johnson, for the Appellee. 1. It is every day's practice for a man to convey or devise his whole estate, either real or personal, and often both. And until now it was never seriously said that the grantee or devisee could not go into parol evidence to prove what was granted or devised to him.

2. The bill of sale in question comes under the act of 1729, ch. 8, *s.* 5, which requires that it should be acknowledged and recorded, where the property is retained by the grantor. It is not said what shall be the form of acknowledgment. There is no form prescribed. Here it appears that the bill of sale was acknowledged, but it is not stated to have been done by *John Deford*—who but *John Deford* could acknowledge it? It is stated to be executed by him, and the presumption is irresistible that he did acknowledge it. It was not objected to when it was offered in evidence, and no advantage can be taken of it now. *Carroll et al. Lessee vs. Norwood*, 4 *Harr. & M'Hen.* 287. The prayer was a special one for the court's direction, which differs the case from *Hall vs. Gittings's Lessee*, 1 *Harr. & Johns.* 27

3. If the parol evidence was illegal, yet it was not excepted to. The defendant's prayer admitted the evidence, and the opinion of the court below was asked upon the whole of the evidence. In the *second* bill of exceptions, the appellant takes advantage of the testimony, and under the *fourth* bill of exceptions he attempts to impeach it. The declarations of *John Deford* were legal evidence, both parties claiming under him. It is too late to except now to evidence, which was admitted to go to the jury.

4. In *Dorsey vs. Gassaway*, 2 *Harr. & Johns.* 402, the opinion of the general court was not excepted to, and no decision

on that point was had in this court. The question, therefore, is open for this court. It was for the defendant below to prove that possession of the property was delivered to *Thomas L. Deford*, and then to call upon the court to say that a copy of the bill of sale was not evidence.

BUCHANAN, Ch. J. delivered the opinion of the court. This is an action of trover, by the appellee, who was plaintiff below, for three negroes, which he claims in right of his wife, and comes up on *three* bills of exceptions taken at the trial by the appellant; on the *first* of which three objections are raised to the opinion of the court below.

First. That the bill of sale from *John Deford* to *Thomas L. Deford*, was void for uncertainty.

Secondly. That it could not be explained by parol evidence; and

Thirdly. That it was not duly acknowledged, and therefore that the copy was not competent evidence.

The *first* and *second* objections there is some difficulty in understanding. The bill of sale is of "all the vendor's personal estate, of whatever kind or description." Now, what uncertainty there is in this, is not easily perceived; the negroes in question are not indeed named in the bill of sale; but surely if they constituted a part of the personal estate of the vendor, they were embraced by a grant of the whole, unless it can be supposed, that a grant of the whole may not include a part. And if the bill of sale was in itself good and effectual to pass property of that description, the only matter of inquiry was, whether the negroes in question did in fact constitute a part of the personal estate of the vendor? But here the *second* objection is started, that the evidence, offered to show that they were a part of the personal estate of *John Deford*, was improperly admitted, on the ground that parol evidence cannot be received to explain a written contract.

It is a general rule of law, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a written instrument. But that rule has no kind of application to this case; the parol evidence offered and received, was not to contradict, add to, or vary the terms of the bill of sale; it was not to show, that a part passed by a grant of the whole, or to explain what was meant by the words "all my personal estate of whatever kind or description," but only to identify the negroes, and to show that they did constitute a part of the personal estate of *John Deford*, at the time of making the bill of sale, and was for that purpose properly admitted.

The *third* objection, that the bill of sale was not duly acknowledged, and the copy therefore improperly admitted in evidence, is of a different character.

The act of 1729, *ch.* 8, *s.* 5, requiring sales, &c. of goods and chattels, in certain cases to be in writing, also requires that writing to be acknowledged and recorded. By the office copy, which was offered in evidence, of the bill of sale from *John Deford* to *Thomas L. Deford*, it does not appear that that paper ever was duly acknowledged; the endorsement on the back of it does indeed purport to be a certificate of acknowledgment before a justice of the peace, but by whom the acknowledgment was made is not stated. It was probably an acknowledgment by *John Deford*, the vendor, and his name omitted by negligence or accident; but to receive such an imperfect instrument as a due acknowledgment of a deed, might lead to a dangerous laxity in practice, and furnish a precedent of mischievous tendency. It is not, therefore, as to this point, material to inquire, whether under the facts and circumstances of the case, the sale by *John Deford* to *Thomas L. Deford*, was by the act of 1729, ch. 8, required to be by writing acknowledged and recorded; if it was, the bill of sale, not being duly acknowledged, it was improperly admitted to record, and the office copy ought not to have been admitted in evidence; and if it was not required to be recorded, the office copy was equally incompetent testimony, the recording of a paper not required by law to be recorded, not having the effect to dispense with the production of the original, and to make a copy legal evidence.

The bill of exceptions is badly worded, but the prayer set out must be considered as an application to the court for the opinion, that the copy offered in evidence of the bill of sale, was not evidence of a transfer of title to the negroes from *John Deford* to *Thomas L. Deford*, which opinion the court ought to have given.

The only question raised upon the *second* bill of exceptions is, whether in the case of a gift of negroes, where the donor does not retain possession, an office copy of a bill of sale is evidence of title in the donee?

By the act of 1763, *ch.* 13, a gift of negroes is only required to be by deed, acknowledged and recorded, where the donor retains possession; and that solemnity not being authorised or required by law, when the possession passes to the donee by delivery, at the time and in pursuance of the gift, an office copy, in such case, of a bill of sale, is not competent evidence to prove title in the donee.

But that question does not properly arise in this case; the proof is, that *Thomas L. Deford* was in possession of the negroes at the time of executing the bill of sale to *Mary Ann Deford,* his infant granddaughter, now the wife of the appellee; and there is not one word of evidence to show, that he parted with the possession at the time; on the contrary, the natural and almost necessary inference would be, considering the sex, age, and situation of the donee, that he did not. The application, therefore, to the court to direct the jury, that if they should believe from the evidence that *Thomas L. Deford,* at the time he executed the bill of sale to *Mary Ann Deford,* did not retain the use and possession of the negroes mentioned in it, the office copy of the bill of sale, which was offered in evidence, was not legal and competent testimony, was upon an abstract proposition, not warranted by, nor founded upon, the evidence in the cause, and the court did right in rejecting the prayer.

The *last* bill of exceptions was taken to the refusal of the court to direct the jury, that upon the whole of the evidence the plaintiff below was not entitled to recover; in which refusal the court was clearly right. The proof on the part of the plaintiff below was shortly this; that the negro woman named *Henny,* and her daughter *Julian,* were formerly the property of *John Deford*; that he frequently acknowledged he had sold them to his father *Thomas L. Deford,* to whom the use and possession were transferred; and that *Thomas L. Deford* transferred them, by bill of sale, to his granddaughter *Mary Ann Deford,* the daughter of *John Deford,* now the wife of the plaintiff below; and that *Alexander* and *Commodore* are also the children of *Henny*, born after the execution of the bill of sale from *Thomas L. Deford* to *Mary Ann*. The defence was founded on a deed of manumission of the negroes, for whom the suit was brought, executed by *John Deford*, since the marriage of his daughter. The proof, therefore, of his acknowledgments anterior to the deed of manumission, that he had sold *Henny* and *Julian* to his father *Thomas L. Deford*, and also that the whole of the negroes in question belonged to his daughter, to whom they had been given by his father, was properly admitted in evidence; and the court could not have given the direction prayed, without usurping the province of the jury, and deciding the question of right between the parties, contrary to the testimony in the cause.

Upon the whole, we concur in opinion with the court below, on the *second* and *last* bills of exceptions, but dissent from the opinion expressed in the *first* exception. That dissent, however, furnishes no ground for a reversal of the judgment; the merits of the case are clearly against the appellant; and if the copy, which was offered in evidence, of the bill of sale from *John Deford* to *Thomas L. Deford* had been rejected, there was proof enough without it to sustain the action.

JUDGMENT AFFIRMED.

* * *

CHAPMAN *vs.* WILLIAMS.—June, 1826.

C was employed by W, principal keeper in the *Maryland Penitentiary*, (and who, as such, had authority to employ deputies,) to act as deputy keeper, at a certain annual compensation. The compensation of all the officers of the institution was by law to be drawn from the treasury of the state. C's compensation was received from the treasury by W, who was afterwards dismissed from the institution. In an action of *assumpsit* by C against W, to recover this sum—*Held*, that he was entitled to recover, and that it was immaterial in what manner C was employed by W, whether it was in W's public or individual capacity; and that it was also immaterial, whether he had paid over the compensation to the directors of the institution, or not, as they had no authority to receive it, and his responsibility to C was in virtue of his receipt of the fund.

APPEAL from *Baltimore* County Court. *Assumpsit* for work and labour, &c. for money had and received, and an *insimul computassent*. The defendant, (now appellee,) pleaded *non assumpsit*, and issue was joined. The facts of the case are stated by the Judge who delivered the opinion of this Court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J.

No Counsel appeared for the Appellant.

Heath, for the Appellee, referred to the acts of 1809, *ch.* 138, *s.* 17; 1811, *ch.* 177, *s.* 3; and 1813, *ch.* 69. And to show that the appellee was not liable in his individual character, he cited *M'Donough vs. Templeman*, 1 *Harr. & Johns.* 156. *Macbeath vs. Haldimand*, 1 *T. R.* 172. *Unwin vs. Wolseley*, *Ibid* 674. *Hodson vs. Dexter*, 1 *Cranch*, 345. *Myrtle vs. Beaver*, 1 *East*, 135. *Walker vs. Swartwout*, 12 *Johns. Rep.* 448. *Key vs. Parnham*, 6 *Harr. & Johns.* 420. *Gidley vs. Palmerston*, 7 *Serg. & Low.* 434; and *Olney vs. Wickes*, 18 *Johns. Rep.* 122.

Archer, J. delivered the opinion of the court. This was a suit instituted in *Baltimore* County Court by the plaintiff, (now appellant,) who was a deputy-keeper in the penitentiary, to recover from the defendant, who was principal keeper, the amount of a quarter year's salary due to him on the 4th of October, 1819. The service of the deputy-keeper in that capacity, and his original employment by the principal keeper, and his continuance in service from the 29th of September 1817, until the 4th of October 1819, were given in evidence. The defendant had regularly paid the plaintiff for all services prior to the 5th of July 1819. Evidence was also given that the amount of salary due the plaintiff to the 4th of October 1819, had been received by the defendant at the expiration of the last quarter of the plaintiff's service, from the treasury of the state, through the *Union Bank of Maryland*, and that it had never been paid to the plaintiff. The plaintiff furthermore proved, that all the funds in the hands of the defendant, as principal keeper, had been by him paid over to the directors of the penitentiary, the amount of the defendant's wages being retained at the request of the directors. Upon the above statement of facts the court below directed the jury, that if they believed the plaintiff was appointed deputy-keeper by the defendant as agent of the state, they should find a verdict for the defendant; and if they were of opinion that the defendant contracted with the plaintiff in his individual character, they should find a verdict for the plaintiff. By the act of 1817, *ch.* 72, the directors of the penitentiary have power to appoint at their pleasure all such deputy-keepers as they may deem necessary for the effectual administration of the concerns of that institution, and have power to fix and regulate their compensation and salary, so that it should not exceed what had before been allowed by law, which, by the acts of 1811, *ch.* 177, & 1813, *ch.* 69, was annually $400. The principal keeper had originally the power to appoint his deputies, and had authority to appoint the plaintiff a deputy when he was first introduced into the institution; and he seems to have been continued in that capacity by the directors, although no formal reappointment appears to have taken place; for his salary has been regularly drawn from the treasury for more than two years after the passage of the law of 1817, and until the expiration of the plaintiff's service, which could only have been done by their assent and approbation. The plaintiff's salary could only be drawn from the treasury by himself, or by his authority. No power over it is confided by law to any of the officers of that institution. The defendant then must have received the money from the treasury of the state, not as a public agent, but under an authority derived from the plaintiff, and must be considered in the light of a private agent, and answerable as such. But if, indeed, without such authority, he had wrongfully possessed himself of the plaintiff 's salary, the plaintiff would have an undoubted right, for all the purposes of this action, to consider him in the light of an agent, and charge him as such. In this view of the case, the inquiry is obviously immaterial in what manner the original employment of the plaintiff was made, whether by the defendant in his public or individual capacity, for this action is grounded on the implied promise resulting from the receipt of funds with which, in his public capacity, he had nothing to do, and over which he had no control, and is not founded at all upon the original contract of employment.

If by any construction of the bill of exceptions it could be inferred that the plaintiff's salary had been paid over to the inspectors of the penitentiary on the defendants' retirement from office, it would, nevertheless, not change the character of the defendants' responsibility. For he is chargeable in virtue of his receipt of the funds, and he cannot defend himself upon the ground that he had paid them over to those having no authority to receive them, but was bound, under the circumstances of this case, to hold them for the plaintiff.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

* * *

Chase, *et al. v.* M'Donald & Ridgely.—June, 1826.

Where A had mortgaged to N certain property to indemnify him against any liability for his endorsements of sundry promissory notes, to be drawn by S in favour of T, and by him endorsed to N, not exceeding $10,000, to be negotiated for the accommodation of S and T, and such notes were so drawn, endorsed and negotiated; and N afterwards became the endorser of other notes, drawn and endorsed by S and T, for other sums of money, and negotiated for their use; and A had by deed transferred to S and T the property thus mortgaged to N, and T had conveyed to R, in trust for the benefit of certain of his creditors, his moiety of the property so conveyed to him—*Held*, that the moiety of T in the property conveyed to him by A, could not be made responsible for more than the sum of $10,000, secured by the mortgage from A to N; and the doctrine of *tacking* could not be brought to bear on the case.

As against a surety the contract cannot be carried beyond the strict letter of it—it cannot be extended by equitable construction.

But as S mortgaged to N his part of the property conveyed to him by A, which had been included in the mortgage from A to N, and also other property, to secure N for his endorsements, therefore, as respects S, he by express contract made his property liable beyond the sum expressed in the mortgage from A to N.

As the evidence showed that N did not incur his further responsibility upon the immediate credit of the land mortgaged to him by A, the doctrine of tacking cannot prevail.

If the bill had been filed by N against T, as mortgagor, to foreclose the mortgage, he could not have a right to tack his claim to the prejudice of other creditors.

There is a distinction between a bill to redeem, and a bill to foreclose a mortgage; in the latter case the mortgagee cannot insist on tacking his subsequent debt, as he may do on a bill for a redemption.

The rules which have been adopted in *England*, in relation to pleas in bar to bills in equity, when resorted to by defendants, are considered as applicable to them here; and where the defendant's plea was not set down for hearing, and no replication was filed to it—*Held*, that the plea did not operate as a bar to the complainant's suit.

In the mortgage from A to N, before mentioned, it is recited that S and T were about to obtain a loan of $10,000 at the *Union Bank*, on notes to be drawn by S in favour of T, and by him endorsed to N, and to be renewed from time to time, &c. That A had agreed to secure the payment of the notes, and to indemnify N for the endorsements of the said notes, or any of them. For which purpose A conveyed certain property to N in fee, with a proviso, that if A, S and T, or either of them, should at all times save harmless N, by reason of any endorsement made by him of the notes of S, not exceeding $10,000, the deed was to be void. The loan was negotiated at the *Union Bank*, and the notes renewed from time to time, drawn and endorsed as above mentioned, until they were afterwards paid by proceeds of a loan obtained upon other notes, drawn and endorsed in like manner, at the *City Bank—Held*, that as the debt due at the *Union Bank* was closed by funds obtained from the *City Bank*, the mortgage from A to N remained as a security to indemnify N against any liability for his endorsements of the last mentioned notes.

Appeal from the Court of Chancery. The complainants in the court below, (now appellees,) filed their bill on the 28th of June 1821, against *Samuel*, *Thomas*, *Richard M.* and *Jeremiah T. Chase*, and *The Farmers' Bank of Maryland*, *The City Bank of Baltimore*, and *T. Lytle*. As the facts in the case are sufficiently stated in the decree of the Chancellor, before whom the cause was fully argued, it is unnecessary to state them here.

Johnson, Chancellor, (July Term 1823.) The complainants filed their bill to obtain a decree for the sale of the property included in two deeds, the first, executed by *S. Chase*, the elder, the father of *S.* and *T. Chase*, two of the defendants, bearing date the 21st of October 1809, duly acknowledged and recorded, to *N. G. Ridgely*, one of the complainants; the other a deed from *S. Chase*, the younger, to *M'Donald* and *Ridgely*, the complainants, in their copartnership capacity, and to *N. G. Ridgely*, individually. The object of the first deed was to indemnify *N. G Ridgely*, who was about to become the endorser of certain notes to be drawn by *S. Chase* in favour of *T. Chase*, to be by him first endorsed, and then by *Ridgely*, and to be discounted at the *Union Bank*. The deed recites, that "whereas *Samuel Chase*, the younger, and *Thomas Chase*, of *Baltimore*, sons of *Samuel Chase*, the elder, are about to obtain a loan of ten thousand dollars from the *Union Bank of Maryland*, in notes drawn by *Samuel*

Chase, the younger, payable sixty days after date to the said *Thomas Chase*, and endorsed by said *Thomas Chase* and the said *Nicholas G. Ridgely*, which said notes are to be *renewed* from time to time as the same become due. And whereas he, the said *Samuel Chase*, the elder, hath agreed to secure the payment of the said notes, and to indemnify the said *Nicholas G. Ridgely* for the endorsement of the said notes, or any of them." The said deed then in due form conveys the property in fee, subject to the following proviso: "that if the said *Samuel Chase*, the elder, *Samuel Chase*, the younger, and *Thomas Chase*, or either of them, their heirs, executors or administrators, shall at all times hereafter save harmless and indemnify the said *Nicholas G. Ridgely*, by reason *of any endorsement* made by him of the notes of the said *Samuel Chase*, the younger, not exceeding the sum of ten thousand dollars," then the conveyance was to cease, and to be null and void. The bill alleges that *N. G. Ridgely*, under the security of the deed, did become endorser of such notes to the amount of $10,000; and that afterwards he became endorser of other notes, drawn by *S. Chase*, junior, in favour of *T. Chase*, and by him endorsed, to the amount of $7,665; all of which said notes were negotiated and discounted by the said *S. Chase* and *T. Chase*, *partly* with the *President and Directors of the Union Bank of Maryland*, and *partly* with the *President and Directors of the City Bank of Baltimore*, and afterwards the *whole* of the said notes, so drawn and endorsed, were negotiated and discounted at and with the *President, Directors and Company, of the City Bank of Baltimore*, by the said *S.* and *T. Chase*. It is also represented in the bill, that *Alexander M'Donald* and *Nicholas G. Ridgely*, copartners in trade under the firm of *M'Donald* and *Ridgely*, became the endorsers of other notes drawn by *Samuel*, and endorsed by *Thomas Chase*, amounting in the whole to $18,000; and that *S. Chase*, the younger, to indemnify and save them harmless, on the 1st of February 1819, executed to them a deed for a moiety of the *same* property included in the former deed, and also for two lots of ground by the deed particularly described, the same being part of a tract of land called *Elizabeth's Diligence*. This deed recites, that "whereas *Alexander M'Donald* and

N. G. Ridgely, trading under the name and firm of *M'Donald* and *Ridgely*, *at the request* and for the *use* of said *Samuel Chase* and *Thomas Chase*, endorsed sundry promissory notes, drawn by the said *Samuel Chase* in favour of the said *Thomas Chase*, and by him endorsed for the use and accommodation of the said *Samuel Chase* and *Thomas Chase*;" and also it is recited in the deed, "that the said *Nicholas G. Ridgely*, in his own name, at the like request, and for the use of the said *Samuel Chase* and *Thomas Chase*, has also endorsed sundry promissory notes, drawn by the said *Samuel Chase*, in favour of said *Thomas Chase*, and by him endorsed for *their own* use and accommodation; all which said notes have been discounted at the *City Bank of Baltimore*, and have been renewed from time to time." The deed also recites, that *M'Donald* and *Ridgely*, and *N. G. Ridgely*, had agreed to continue to endorse from time to time as the same became due, in consideration of which, and to save harmless and indemnify them, the deed was executed; the property conveyed, "to be held in trust to save harmless and indemnify them, or either of them, from all loss or injury that they, or either of them, may at any time hereafter sustain, or be put to, on account of the endorsements made or to be made." The complainants state that they did endorse several notes drawn by *Samuel*, and endorsed by *Thomas Chase*, amounting to the sum of $18,000, which were negotiated and discounted by *S.* and *T. Chase*, at and with the *President and Directors of the City Bank of Baltimore*, for their own use and accommodation; one of those notes, as the bill declares, was retired and taken up by *M'Donald & Ridgely*, the others, at the filing of the bill, were held by the bank. *S. Chase*, the drawer, and *T. Chase*, the endorser, as the bill declares, failed to pay the interest on the notes at the time of the renewal, and *N. G. Ridgely* was forced to pay on the notes for $17,665, endorsed by him, to save his commercial credit, as the notes, unless the interest was paid, would have been protested. The amount paid by him up to the 25th of June 1821, was $2,072 64. That *S.* and *T. Chase*, on being requested to pay that sum, as well as the accruing interest, declared their inability to do so. That *S.* and *T. Chase*, failed to pay the interest on the notes for $18,000 endorsed by *M'Donald & Ridgely*, and to prevent a protest, and to preserve their commercial credit, they were compelled to pay to the amount of $2,048 up to the 18th of June 1821, which sum they, *S.* and *T. Chase*, have declared their inability to pay; and that *M'Donald & Ridgely* have taken up and retired one of the notes, a part of the $18,000, the amount of which was $3000, due the 23d of June 1821, and the costs of protest, to wit, $1 74, *S.* and *T. Chase* having declared their inability to pay. On the 1st of June 1819, as the bill sets forth, *S. Chase*, the younger, conveyed to *T. Chase* the same property included in the deed of the 1st of February preceding, and subject to that deed, to indemnify *Thomas*, as *Samuel's* endorser; and on the 17th of the same June, *T. Chase* conveyed to *Richard M. Chase*, the other moiety of the property included in the mortgage deed of *S. Chase*, the elder, to *N. G. Ridgely*, of the 21st of October 1809, in trust, and with power to *R. M. Chase* to sell the same, and apply the proceeds, first to pay the *The Farmers' Bank of Maryland* $6,600, to pay to himself $5,404 25, and to pay to *Jeremiah T. Chase* the sum of $1,485, with interest, and to hold the residue for the use of *T. Chase*. On the 4th of October 1819, *S. Chase*, the younger, conveyed to the *City Bank of Baltimore* the same property included in his deed to *M'Donald & Ridgely*, of the 1st of February preceding, subject to the preceding conveyance, to secure to the bank the sum of $8,468, due beyond the two sums of $18,000 and $17,665, for which *M'Donald & Ridgely* in their copartnership capacity, and *N. G. Ridgely* individually, as endorsers, were liable for, or had in part paid by retiring the two notes before mentioned. *S. Chase*, the elder, by deed duly executed, acknowledged and recorded, on the 18th of June 1811, conveyed to his sons *S.* and *T. Chase*, the same property he had mortgaged to *N. G. Ridgely* on the 21st of October 1809; by this conveyance *the equity of redemption* in the mortgage premises was transferred to them; and *that interest only* could pass from *S.* and *T. Chase*, by the deeds subsequently made by them. The bill also alleges, that *S. Chase*, the younger, conveyed part of the same property to *Thomas Lytle*. But the property conveyed to him appears not to be any part of that now in contest, and the bill, as to him, has been dismissed.

By the joint and separate answer of *S.* and *T. Chase,* the mortgage by *S. Chase,* the elder, is admitted; but the defendant, *Samuel,* denies that *Thomas* had any interest therein, or was to have any part thereof, but that the loan was had for his own *sole* and *separate* use and purpose, and was used and laid out by him at his sole discretion, a part thereof being applied by him to the payment of claims and demands against his said father, at his request. The endorsements by *N. G. Ridgely* for the $10,000, and for $7,665, are admitted as *set forth in the bill;* but the notes, as *Samuel* and *Thomas* allege, were discounted for the sole use of *Samuel.* The endorsement by *M'Donald* and *Ridgely* to the amount of $18,000, as *set forth in the bill,* is also admitted, and the deed of the first of February 1819 to indemnify them; but they deny the notes were negotiated and discounted for *their joint* use and accommodation, but were negotiated and discounted for the sole use of *Samuel. Samuel,* in his answer, alleges that he paid the discounts, until on or about the — day of ——, in the year last aforesaid, when he, being unable to pay the said interest or discount as the notes became due, *N. G. Ridgely,* and the complainants, agreed to pay the same for him. The time, to which the discounts were paid by *Samuel,* from the above extract from his answer, is not precisely stated, but as the year 1819 is the year stated in the part of the answer preceding the extract, the words, in the extract in the year last aforesaid, must refer to that period, and ascertain *the year* when he failed to pay. *Samuel,* in his answer, states that he transferred to the complainants three whole shares of stock in the *Baltimore Exchange Company,* two hundred dollars on each share having been paid by him, and that on the 9th of November 1819, he made over, and assigned in writing to them, $1500 per year, payable quarterly, out of the rents growing due on the *Fountain Inn,* after the 1st of April 1820. The conveyances to *T. Chase,* and to the *City Bank,* are also admitted, as well as the deed to *Lytle. S. Chase* also states that he conveyed to *R. M. Chase,* one lot of ground, part of *Elizabeth's Diligence,* in trust for *T. Chase,* and *Matilda* his wife; that this conveyance was known to the complainants at the time he executed the mortgage to them. The time of the conveyance to *R. M. Chase* is not stated, blanks are left for the month and year, and a reference for the deed is made to the records of *Baltimore* county. The deed itself, nor a copy, was filed with the answer.

Since the argument of the cause a copy of a deed, taken from the records of the court of appeals, and filed the 6th of August 1823, has been presented to me; it purports to convey a lot of ground in the city of *Baltimore*, in consideration of $5, to *Richard M.* Chase, in trust for *Thomas Chase*, of the city of *Baltimore*, and *Matilda Chase*, his wife, for and during their joint lives, and the life of the survivor of them, without impeachment of or for any manner of waste, and after their deaths, in trust for the use and behoof of the right heirs of the said *Thomas Chase*, and *Matilda* his wife, in fee simple. This deed bears date the 30th of August 1817. The lot of ground, included in the deed, may be part of *Elizabeth's Diligence*, and included in the mortgage to *M'Donald & Ridgely*, of the 1st of February 1819, but there is nothing on the face of the deed from whence we must necessarily conclude it to be part of that tract. It may be, and I presume is, the deed referred to in the answer, although it does not correspond to the description there given of it; but be this as it may, it appears foreign from the matter in controversy. The bill takes no notice of this deed, nor does it claim to have it vacated, or the property included in it sold, nor is *Matilda* Chase, who is interested in that deed, a party to this cause, and of course her interest must remain unaffected by any decree which may pass.

T. Chase, in his answer, also denies he had any interest in the loans, or was interested except as his brother's endorser, and denies that he ever saw the deed from his father to *N. G. Ridgely* until filed in this cause; and as he had no part or interest in the said sum of $10,000, so obtained by the said *S. Chase*, it would be right that his brother's moiety of the property mortgaged as security therefor, be first sold and applied to this purpose, and in case of its being deficient, then resort to be had to the other property mortgaged by *Samuel*, before recurrence should be had to the moiety of *Thomas*.

The defendants, as to so much of the bill as seeks a sale of the said premises, also answer and plead thereto, and for plea and answer say, that after the execution of the said several and respective deeds, mentioned and set forth, that these defendants, together with *R. M. Chase*, the other defendant did, at the request and solicitation of the complainants, on or about the 1st of March, 1820, make, execute, acknowledge and deliver, to the complainants, their deed of indenture, whereby the defendants gave to the complainants full and ample power and authority to sell and dispose of the said premises, on the terms and conditions in the said deed mentioned and expressed, and that the complainants did accept of the said deed upon the terms and conditions therein expressed, and that they did cause the deed to be recorded in the land records of *Baltimore* county. A copy of the deed is filed as part of the plea, the original alleged to be in the possession of the complainants.

Richard M. Chase, in his answer, admits the execution of the deed of the 17th of June 1819, by *T. Chase*; for the moiety of the property included in the mortgage of *S. Chase*, deceased, to *N. G. Ridgely*, of 1809; he *R. M. Chase* claims and insists, that under the deed to him he is entitled to a *preference* over the complainants, *after the* $10,000 is discharged, which, as he contends, should be raised out of the moiety of *S. Chase*, and his other property, and that the moiety conveyed by *T. Chase*, should not be sold without the consent of *R. M. Chase*, unless *S. Chase's* property should be insufficient to discharge the mortgage, and in such case only so much as will supply such deficiency.

The answers of the three defendants, *Samuel*, *Thomas*, and *Richard M. Chase*, present all the grounds on which the claim of the complainants is resisted.

In the argument of the case several points were relied on that do not present themselves to the notice of the court by the defences set forth in the answers. Before any attention is bestowed on the points relied on at the argument, it will be necessary to premise a few facts, clearly established by the evidence in the cause.

Unwilling to determine controverted facts, which were susceptible of indisputable proof, after the first argument in the case, an interlocutory decree was passed, in substance as follows: Several important points of law and equity have been raised, on the determination of which the merits of the respective parties will depend. Not only those points were pressed with great force and earnestness, but the facts existing in the cause were also controverted, and until the facts are established, either by proof or by admissions, it is judged premature to determine on the law and equity of the case, which may vary according as the truth of the case may present itself. If, for example, the original or the subsequent mortgage was paid off, either by *S.* or *T. Chase*, with *their own funds*, not proceeding *directly* or *indirectly* from the complainants, or one of them, surely they can have no claim on the mortgage premises; but it may be otherwise if the funds, that were applied in discharge of the mortgage, were obtained in consequence of their responsibility, and which they, in consequence of their liability, have been since compelled to replace or pay to the bank from whence they were obtained, whether that was the *Union* or the *City Bank.* The auditor, by the interlocutory decree, was directed to state an account from the evidence in the cause, or from such as might be laid before him by the parties, in which account he was directed to make it appear what sum (if any,) is due to the complainants, or either of them, in consequence of money paid by them, or either of them, as the endorsers of the notes of *S. Chase*, and which notes were first endorsed by *T. Chase;* to what bank the same was paid; and whether, if paid to the *City Bank of Baltimore*, the debts there arose to meet notes, and what notes, before discounted at the *Union Bank.* That he should state the sum due at the audit, and the sum due when the present bill was filed.

No other proof was laid before the auditor on the part of the complainants; but evidence was produced to prove the sum due to the *Farmers' Bank of Maryland*, which debt was intended to be secured by the deed of trust to *R. M. Chase*, from *T. Chase*, of the 17th of June 1819. By the evidence of the Teller of the bank, taken before the auditor, it appears that on the 6th of January 1819, a note drawn by *T. Chase* for $6,600, endorsed by *Richard I. Crabb*, *Samuel Chase* and *Richard M. Chase*, was discounted by the bank, and the proceeds thereof passed to the credit of *T. Chase;* that the note was renewed until the debt amounted to $6,743 09, and on the 10th of November 1819, it was protested; that that debt is due to the *Farmers' Bank.*

By the report of the auditor of the 18th of April 1823, it appears that at the time the present bill was filed, to wit, on the 28th of June 1821, there was due to *M'Donald* and *Ridgely* the sum of $5,169 98, and to *N. G. Ridgely* the sum of $2,190 06; that at the date of the audit there was due *M'Donald* and *Ridgely* on account of monies paid by them as endorsers of notes of *S. Chase*, first endorsed by *T. Chase* to the *City Bank of Baltimore*, the sum of $21,972 27, and to *N. G. Ridgely* individually the sum of $21,988 45, making the aggregate of $43,960 72. The auditor in his report remarks, whether the said notes to the *City Bank* were negotiated to meet notes discounted at the *Union Bank*, does not distinctly appear, although it may be remotely inferred *from the fact* that some of the defendants, and especially *S. Chase*, *seem* to have considered the mortgage of 1809 as a *subsisting security* to the complainant, *Ridgely*, to the amount of $10,000, after and notwithstanding the payment of his notes to the *Union Bank* in 1813.

The auditor could not have exercised his usual circumspection when the above remarks were made; it is not *S. Chase's seeming* to consider the mortgage of 1809 as subsisting, from whence it is to be inferred that the debt to the *Union Bank* was discharged, by funds obtained from the *City Bank* on the notes of *S. Chase*, endorsed by *T. Chase*, and by the complainants. The complainants in their bill expressly state, that the notes discounted at the *Union Bank* were *all* afterwards negotiated and discounted at the *City Bank;* the defendant, *S. Chase*, in his answer expressly admits that *N. G. Ridgely* did become his endorser to the amount of $10,000, and also that he afterwards further endorsed for him to the amount of $7,665, and that he, *S. Chase*, negotiated and discounted *the said notes as set forth in the said bill of complaint.* *T. Chase*, *R. M. Chase*, and *J. T. Chase*, all by their answers recognize and admit the mortgage of 1809 as in full force, and entitled to a preference; and in the deed of the 1st of March 1820, executed by *S. Chase*, *T. Chase*, and *R. M. Chase*, the existence of the mortgage is admitted, and allowed to be entitled to a preference. Against *that* claim, until the argument of the cause, no one appears ever to have made the least objection. But if the debt to the *Union*

Bank had been discharged by *S.* or *T. Chase*, or if they entertained a doubt as to their capacity of transferring the claim from the *Union* to the *City Bank*, so as to be secured by the mortgage, such admissions and concessions never would have appeared. The *City Bank* was incorporated by a law which passed on the 31st of December 1812, and *Samuel Chase* is one of the persons appointed commissioners to carry the act into effect, and in all probability was one of the first directors of the bank. By the evidence of *J. Pinkney*, the cashier of the *Union Bank*, his *(S. Chase's)* account was closed on the 20th of July 1813, very shortly after the *City Bank* got into operation; and exclusive of the evidence mentioned, there would be every reason to conclude he would wish to transfer his debt from a bank, over which he had no control, to one in which he could have influence. On the whole, I am perfectly satisfied that the debt to the *Union Bank* was closed by funds obtained from the *City Bank*, on notes drawn and endorsed, as stated in the bill, and that the sums stated by the auditor as due when the bill was filed, was then due, as well as the sums stated to be due to the date of the audit.

It remains to be considered whether the complainants are, on equitable principles, entitled to a decree for the sale of the property, and if entitled to a preference, to what extent. And supposing them justly entitled to relief, are they excluded by the *manner* that the cause has been conducted? In other words, as the complainants failed to set the plea down for argument, must that plea, although the court is satisfied as to its insufficiency to bar the demand for a decree to sell, cause the bill to be dismissed, leaving the parties to the only relief extended to them by the deed of the 1st of March 1820, or *de novo* to enter this court?

In support of the claims of those intended to be benefitted by the deed of trust to *R. M. Chase* of the 17th of June 1819, it has been contended, that as by the books of the *Union Bank* the claim against *S. Chase* appeared to be closed, therefore *R. M. Chase* must, although the debt at the *Union Bank* was discharged with the funds of the complainants, be considered as a purchaser without notice. I shall not examine the case with a view to substantiate the knowledge of *R. M. Chase*, as also of those for whom he held the property in trust, of the nature and extent of the complainants' demand at the time the deed was given to him; for it is perfectly immaterial whether he was apprised of its extent or not.

I lay it down as incontrovertible, that he to whom an equitable interest is passed can never stand in a better situation than the person from whom such interest was obtained. But he who obtains a legal interest may, if his equity is as strong as his competitor, overreach and defeat him. If, therefore, a person is so imprudent as to convey his land, and deliver the possession before he is paid, although he retains an equitable lien on the land for the amount of the purchase money, such lien only remains while the property is in the possession of the vendee, or those claiming voluntarily under him, or those claiming as purchasers under him, without a knowledge of the nonpayment. But the moment the vendee re-sells and conveys to a *bona fide* purchaser, ignorant of the original purchase money not having been paid, his equitable lien immediately vanishes. Not so he who sells lands and obliges himself to convey them, though that obligation can never be enforced by the *vendee*, or *any person* claiming under him, until the whole purchase money is paid—no matter what representations may be made by the first to the second vendee—no *matter* how totally ignorant he may be of the claim of the original vendee, the first vendee can place the second in no other predicament than that in which he himself stood. Books, it is presumed, need not be cited to establish those principles, and if correct, they prostrate any pretensions *R. M. Chase*, or those for whom he holds in trust, can have on the ground of his being a purchaser *without notice*. In virtue of the deed of 1809 from *S. Chase*, deceased, the *legal* estate in the mortgage premises was and still is in *N. G. Ridgely*. *S. Chase*, the elder, by his deed to *S.* and *T. Chase*, his sons, could only, and did only, transfer to them the equity of redemption, the legal estate was not under his control, and as the sons only obtained the equity of redemption, nothing more could pass from them. If then the mortgage of 1809 be a subsisting mortgage, susceptible of being enforced in this court, that portion of defence, resting on *R. M. Chase's* want of notice, must fail.

It has been contended that the mortgage of *S.* Chase, the elder, was confined to negotiations at the *Union Bank*, and no claim could be set up under it for any negotiations at the *City Bank*, although the same arose to meet or close the claim of the *Union Bank.* If *S.* Chase, the elder, was now alive, and made a party to this cause, to prevent a decree for the sale of the mortgaged premises to discharge the $10,000 loan, was to set up as his defence, that the object of his mortgage was to confine the negotiations to the *Union Bank*, and that he was ignorant of the transfer to the *City Bank*, I should doubt his success; indeed, my impressions are it would not avail. The mortgage itself appears sufficiently comprehensive to indemnify *N. G. Ridgely* to the extent of $10,000, no matter *where* the notes were discounted, although the deed purports to recite a loan about to be obtained from the *Union Bank*, and how it was to be procured and secured, yet in the proviso of the deed, by which the equity of redemption is created, the language is *more* comprehensive. The property is to remain in the mortgage, unless "*Samuel* Chase, the elder, *Samuel* Chase, the younger, and *Thomas* Chase, or either of them, their heirs, executors or administrators, shall at all times save harmless and indemnify the said *Nicholas G. Ridgely*, by reason of any endorsement made by him of the notes of the said *Samuel* Chase, the younger, not exceeding the said sum of ten thousand dollars."

Although it was much relied on in the argument that the mortgage of 1809 was limited to negotiations at the *Union Bank*, yet no authority was produced to establish the position, that the recital of the deed must confine its operations to such transactions as it recites. I cannot for one moment believe it was the intention of the father to limit the transactions to that bank—there they were to commence, but where closed could be of no importance. He was desirous to restrain them as to the amount—that effected, any paper *N. G. Ridgely* might endorse for *Samuel*, the younger, was to be protected by the deed. The arrangement in the deed was wise and judicious, and such language used as the occasion demanded—nothing less could be expected from those intelligent persons. The father designed to limit the amount of his responsibility—the sons desired an accommodation, a continuing one, the *duration* of which was then unknown. Their views might have been speedily frustrated by the refusal of the *Union Bank* to continue the accommodation—the funds received on the loan might have been used in the contemplated speculation, and unless the notes at that bank could be met by funds arising from other notes discounted at another bank, ruinous consequences might have followed. To meet, therefore, any crisis that might arise, the endorser, *N. G. Ridgely*, is to be indemnified for any notes confined to the limits of $10,000, he might endorse for *Samuel Chase*. But if *S. Chase*, the elder, supposing that his mortgage could not be responsible for any debts, except on notes negotiated at the *Union Bank*, had assented to *N. G. Ridgely's* endorsing other notes to be discounted at another bank, could he be permitted to redeem without first discharging those notes, and thereby exonerate the endorser? What could defeat his responsibility, thus voluntarily incurred for the benefit of his sons—drawing in with it the liability of the endorser he had originally contracted to indemnify?

The cause under consideration cannot be more favourable to those claiming under the deed of the 17th of June 1819, than would be that of *S. Chase*, the elder, supposing him to have admitted and consented to a change from the *Union* to the *City Bank*. For *S.* and *T. Chase*, his gratuitous grantees, under his deed to them of 1811, did consent to the change, as is demonstrated by the retiring of the notes at the *Union Bank*, and the revival of them at the *City Bank*.

There is another point of view in which this cause may be considered. It is a principle, firmly established in equity, that a surety who discharges a debt is entitled to all the indemnities and securities that the original creditor possessed. The payment to him by the security is not considered a discharge of the debt, but as a consideration on account of which the claim is transferred to the security. If, therefore, the mortgage of 1809 had been given to the *Union Bank*, and not to *N. G. Ridgely*, without a formal assignment of that mortgage, equity would give him the benefit of it; and surely, if a court of equity would give him the benefit of the mortgage given to the bank, it will not deprive him of one given to himself.

Let us now suppose that *S. Chase* the younger, or *S.* and

T. Chase had the legal estate in the property included in the deed of 1809, and that they had executed that deed to *N. G. Ridgely*, and that *M'Donald* and *Ridgely* had gone on to make themselves, as the securities of the *Chases*, responsible to a larger amount, can it be questioned but that the mortgagors would be compelled, not only to pay the $10,000, the immediate object of that deed, but to exonerate the mortgagees from all other engagements for which they, *M'Donald* and *Ridgely*, were responsible as the endorsers of the *Chases?* Need books be produced to establish that a mortgagor, as between him and the mortgagee, must not only pay the debt expressly secured by the mortgage, but all other debts he owes the mortgagee. It appears to me, from the evidence in this case, to be clearly proved, that on the 1st of February 1819, *M'Donald* and *Ridgely*, as endorsers, were responsible for the *Chases* to the amount of $18,000, and *N. G. Ridgely*, individually, to $17,665; at that time no other person, who is a party in this cause, had an interest in the premises, except *S.* and *T. Chase*, under their father's deed of 1811, and *N. G. Ridgely* under the deed of 1809, and on that day *S. Chase* conveyed as additional indemnity the property described in his deed.

A third mortgagee who advances his money, ignorant of a second, has a right, if he can, to obtain a transfer of the first to himself, to unite them, and resist the claim of the second. If so, surely the first mortgagee can claim the benefit of the mortgage to secure subsequent advances; for he who has the *legal* title and *equal equity*, must prevail. The equitable title of the complainants, originating long before that of those claiming under the deed of the 17th of June 1819, blended with the legal title in one of the complainants, must be preferred. Particular reference, in support of the principles laid down, was deemed unnecessary; but those who may desire to see authorities in their support, are referred to *Powell on Contracts, chap.* 7, and to the cases there referred to, and to 2 *Fonbl. B.* 3, *ch.* 3. That the surety who pays the debt is entitled to stand in the situation of the creditor, and entitled to all securities by which the debt was assured, they are referred to 1 *Kaime's Principles of Equity*, B. 1, *ch.* 3, *s.* 1, and to the decisions of the court of appeals of this state in the cases of *Ghiselin vs. Fergusson*, 4 *Harr. & Johns.* 522, and of *Sotheron's Lessee vs. Reed*, *Ibid* 307.

From the view taken of the case it appears immaterial whether *T. Chase* was a co-principal in the transaction, or an endorser or mere security; for it is manifest, exclusive of the principle by which a first endorser must be responsible to the second, that in this transaction, in its original commencement, he was to stand responsible to the subsequent endorser. I shall not, therefore, go into the unpleasant inquiry of determining that he was responsible on the ground of having been an equal participator in the reception of the money raised by the notes endorsed by him and the complainants.

It appears from the evidence, that before the deed of the 1st of March 1820 was executed, an offer had been made by the *Baltimore Improving Company* to purchase the property known by the name of *Chase's Wharf*, which had been rejected by the *Chases;* and that so far from their being able to save harmless and indemnify their endorsers, or to free their minds from the dread of their heavy responsibility, that it was not in their power to pay the discounts. The complainants were forced to pay the discounts, and to retain on themselves their responsibility for the principal, they became extremely solicitous to obtain counter-security other than what they had received, and that effected, as no means of an immediate plan presented itself by which they were effectually to be extricated, they were willing, or rather consented, to remain the endorsers. But to obtain that counter-security, the complainants solicitously appealed to the *Chases*, from whom they received promises of doing all in their power. Various projects were made by which they were not only to be indemnified ultimately, but freed from the dread of an immediate call by the *City Bank*, either for the whole or partial payments, until the funds of the *Chases* should be productive; ultimately the whole terminated in the deed of the 1st March 1820. And if the complainants are to be restricted to that deed, and the principles laid down in this decree, to wit, their right to avail themselves of the mortgage of 1809, to cover not only the $10,000, but all their subsequent engagements, then, so far from receiving additional counter-security to that which they had, if the moiety of *T. Chase*, in the mortgaged premises, extended to the whole of the endorsements, so far from the deed of 1820 being an additional security, it reduced that which they had $15,000. This deed, when sent to the complainants, who most evidently were not apprised of their rights under the deed of 1809, to secure themselves from the pressing demands of the *City Bank*, and to obtain time, they were desirous should be sanctioned by that institution; but on consideration the bank rejected it, and thereby left the complainants in their former predicament, bound to meet the discounts, and ultimately the whole claim. On that deed reliance is now placed by the defendants to defeat the bill; and whether the deed of itself ought to bar the demand, and close all claim on the part of the complainants under the deed of 1809, justly and equitably, if correctly brought before the court, is deemed not material, because, as is contended, it is now before the court in that *form* in which *its merits* are of no importance, provided the facts set forth in the plea, through which it presents itself to the court, are established, and this because the *complainants failed* to set the plea down for argument, but *replied* to the same, and thereby placed the *fact of its* truth, and not its merits, to the attention of the court.

As then it appears to the court that the complainants, exclusive of the deed of the 1st of March 1820, are entitled to relief, the only subjects remaining for consideration are, is that deed of itself a bar, or has the manner in which it has been brought to the court's attention been such as must cause the bill to be dismissed?

A plea in equity is a special matter pleaded by a defendant to a bill, or to some part thereof, shewing and relying on *one* or *more* facts set forth in the plea, as a cause why the plaintiff should not be relieved; it is nothing *more* than a *special answer*, shewing or relying on one or more things why the suit should either be dismissed or barred. 1 *Harrison's Cha. Pr.* 218. From the above definition it appears, that in substance a *plea* and a *special answer* is the same thing; and one would conclude they would be treated in conducting and determining the cause *alike*. But it is contended, that the authorities prove that by *replying to a plea*, and not causing it to be set down to be argued, its sufficiency is admitted, and if proved to be true, the bill must be dismissed, notwithstanding the court should be of the opinion that the matter relied on in the plea ought not to bar the claim, or cause the bill to be dismissed. I am inclined to believe this is the first time in this state, where an attempt has been made to dismiss a bill by a plea defective in itself, and presenting to the court no legal or equitable defence. I am not apprised of the present practice in the court of chancery of *England*, but the cases from which the modern compilers have deduced the rules found in *Mitford*, *Maddox* and *Newland's Addition of Harrison's Chancery*, are not of modern date, and the reasons given for dismissing a bill on a defective plea, because it was replied to, are by no means satisfactory, and the authorities in regard to pleas are variant. According to *Harrison's Practice*, a plea may rely on *one* or *more facts*; according to *Mitford* "the defence proper for a plea is such as reduces the cause, or some part of it, to a *single point*, and from thence creates a bar to the suit." *Mitford*, 177. The same book, 198, lays down the following position: "If the plaintiff sets down the plea to be argued, he *admits the truth* of the plea." The authority referred to by *Mitford* for the position, is *Urlin vs.* ——, 1 *Vernon*, 332, determined in the year 1685. In that case the defendant plead, "that the plaintiff brought a former suit for the same matters, which suit is still dependant for *aught he knows to the contrary.*" It seems, that the *defendant* in that cause set the plea down to be argued, and on the argument it was, (and according to my judgment correctly,) "insisted that the plea was not good, *because* he does not positively aver that the former suit is still depending, *and no issue can be taken on his knowledge to the contrary.*" But the Master of the Rolls allowed the plea; and for what reason? "Because the *defendant* ought not to have set it down to be argued, for by that he admits that the former suit for the same matter is depending." If this is to govern, every defendant, whose plea is *false*, will set it down for argument, and thus establish *its truth.* If then the plaintiff sets the plea down for argument, he admits its *truth.* And in *Mitford* 240, we find another rule; if both of them be correct, the complainants are placed in a serious dilemma. For "if the plea, on argument, is held to be *good in law*, or the plaintiff admits it to be so *by* replying to it, the *truth* of the plea is the only subject in question remaining; and if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, *even although the plea is not good either in point of form or substance. Mitford*, 241. Those, therefore, who conduct the defences by *pleas*, and not by *answers*, must have one point yielded to them, either the *law* or the *fact;* for if you think proper to call in question the lawfulness of the plea, you must set it down for argument, and thereby admit its truth; if you are disposed to question the truth of the facts, you must first make up your mind to yield the point of law. But if the same matters were relied on as a defence in an answer, the defendant would have first to prove their truth, before their effect would be taken into consideration. And the reason given for those most extraordinary positions is, "because by having the judgment of the court upon that point, the parties are saved the expense of an examination." But the plea must be confined to "*a single point;*" for "it would be highly improper that the court should first give judgment upon the circumstances, and that an examination should come afterwards." *Harrison's Ch. Pr* 218. *Chapman vs. Turner*, 1 *Atk.* 54. Notwithstanding the justly exalted character of the person whose reasons are above stated, no less a man than Lord *Hardwicke*, yet to me they are far from being satisfactory.

To me it seems as highly improper for the court first to give judgment on one *point* as on *several, until the fact* or facts were established on which the point or points arose. Again, how is expense to be saved? For it seems "even after the argument of the plea, and allowance thereof by the court, the plaintiff may, by filing a replication to the plea, oblige the defendant to prove its truth." 2 *Maddox*, 236. So far from any expense being saved by an argument on the plea, before the facts set forth are established, additional expense must be incurred. First, on the argument of the law; and secondly, of the facts; and if they are proved not to be true, the court has been called on to determine a case not before them. If I was perfectly satisfied that the facts stated in the plea in the cause under consideration were true, yet, as in my judgment they constitute no legal or equitable defence, I should feel myself bound to overrule the plea, notwithstanding the complainants had replied to it. But in this cause it will be found no replication ever was entered. I agree with the present disposition of *English* courts of chancery, as communicated by *Mitford*, 181, "there is little disposition in the courts of equity to countenance *those defences* which tend to prevent the progress of a suit to a hearing in the ordinary way, whatever the expense of the proceeding may be."

The defendants, *S.* and *T. Chase*, filed their answers on the 6th of December 1821, and on the 15th of the same month a commission to take the evidence *issued by consent.* If it was competent for the defendants to defeat the present bill on account of the complainants' replying to their plea; yet as no replication appears in the cause, either by the papers or the docket entries, that part of the defence, much relied on at the trial, is removed.

On the whole, being satisfied of the great justice and equity of the complainants, and that they are entitled to relief—*Decreed*, that unless the defendants shall, on or before the nineteenth day of April next, pay to the complainants, or bring into this court to be paid to them, the sum of $43,960 70, with interest from the 18th of April last on $35,665, (a part thereof,) until paid, together with the costs of this suit, that the property included in the mortgage from *Samuel Chase*, deceased, to *Nicholas G. Ridgely*, one of the complainants, bearing date the 21st of October 1809, and the property also included in a deed from *Samuel Chase*, one of the defendants, to the complainants, bearing date the 1st of February 1819, except such part of the property included in the last deed that was conveyed by the said *Samuel Chase* to *Richard M. Chase*, one of the defendants, in trust, by a deed bearing date the 30th of August 1817, shall be sold. That *Samuel Moale*, be and he is hereby appointed trustee to make the said sale, &c. From this decree the defendants appealed to this Court.

The cause was argued at the last June term before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and ARCHER, J.

Wirt, (Attorney General of *U. S.*) *Magruder*, and *Mayer*, for the Appellants. The complainants, (the now appellees,) charge that they became endorsers for *S. Chase*, junior, of promissory notes to a large amount, which were negotiated in the *Union Bank of Maryland* and *City Bank of Baltimore*; that some of these notes they have actually paid, and the rest they will be compelled to pay. They pray a sale of the land mentioned in the deed from *S. Chase*, senior, to *N. G. Ridgely*, dated the 21st of October 1809; and they claim that by virtue of that deed, the land thereby conveyed is answerable, as well to *M'Donald* and *Ridgely* as to *N. G. Ridgely*, for the amount of the endorsements by them; and that they are entitled to be preferred to the creditors of *T. Chase*, in the distribution of the proceeds of the sale of his portion of the land. The different defendants take different grounds of defence. *S.* and *T. Chase* by plea set forth the deed of the 1st of March 1820, and insist that that deed is a bar to the relief sought of them. *J. T. Chase* and *R. M. Chase*, creditors of *T. Chase*, insist that his portion of the land ought not to be sold for the payment of the complainants' claim, until it is ascertained that all the property mortgaged by *S. Chase*, junior, to the complainants, and which is unquestionably answerable for their claims, should prove insufficient. The *Farmers' Bank of Maryland*, another of the creditors of *T. Chase*, and the payment of whose debt was secured by the deed of the 1st of March 1820 to *R. M. Chase*, know nothing of the claims of the complainants, but insist that the claim of the bank is entitled to a preference to any claim the complainants may have upon the estate of *T. Chase*. The *Farmers' Bank* consented to an immediate sale of the premises, leaving the question of preference to be decided after the sale takes place. This was obviously the proper course, because, until it was ascertained that the property of *S. Chase*, junior, would prove insufficient to pay the debts of the complainants, it could not be known that the question of preference was one in which the parties were interested. This course, however, could only be adopted with the consent of all the parties. The other parties insisted that the whole equity of the case should be settled before a sale was decreed, and of course this part of the answer of the *Farmers' Bank* is of no importance.

The chancellor decided the whole equity of the case in favour of the complainants—overruled the plea, and adjudged that the property conveyed by the deed was answerable, as well for the amount of endorsements by *M'Donald* and *Ridgely*, as by *N. G. Ridgely*, and that all of them must be paid before the creditors of *T. Chase* could claim to be paid out of the proceeds of sale of *T. Chase's* part of the land.

Three questions arise in this case. 1. The effect of the plea. 2. The claim of *M'Donald* and *Ridgely*. Is the property conveyed by the deed of *S Chase*, senior, to be charged with the payment of any part of that claim? 3. Can *N. G. Ridgely* ask a sale of this property to reimburse to him any part of the money which he alleges to have been paid by him?

1. With respect to the plea, it was for the complainants to decide whether they would admit the truth of it, and deny its sufficiency, or admit its sufficiency, and deny its truth. The latter was to be done by a general replication. If they intended to admit the matters set forth, although true, to be insufficient in law, then they ought to have set down the case for hearing upon the plea. It is stated in *Mitford*, 240, that if the plea is upon argument held to be good in law, *or the plaintiff admits it to be so by replying to it*, the truth of the plea is the only subject of question remaining, so far as the plea extends. If the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good, *either in point of form or substance.* See also *Cooper's Plead.* 233. The truth of the matters set forth and relied on in the plea cannot be contested. If then the complainants did not choose to take the judgment of the court upon the sufficiency of the plea, but has in truth admitted its sufficiency, and put in issue the truth of the matters contained in it, then "the suit, so far as the plea extends, is barred." In the court below, it was considered that the complainants had put in issue the truth of the matter in the plea. A commission had been issued to take testimony, which of course was irregular, until a general replication was put in. It was discovered, however, by the chancellor, after the argument, that the complainants had omitted to put in any general replication. Of course, as the case had not been set down for

hearing on bill and answer, there was no case ready for decree. The error being discovered at that time, and before any decree was pronounced, the course to have been taken is pointed out in the books of practice. "Where by mistake, (says *Mitford*, 257,) a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc.*" This might have been done in the court below, and then the only question upon the plea was as to the truth of it; but it was not done, and then the parties were not at issue. Nothing set forth in any of the answers was admitted, or denied, and this cause was in the situation of a suit at law, in which the defendant has pleaded, and the plaintiff has yet to decide whether he will take issue upon the truth or sufficiency of the matter pleaded—whether he will *reply* or *demur*. The error on the part of the complainants not having been corrected, after the argument, as it might have been *nunc pro tunc*, the question is, can it be corrected in this court? Can this court permit the replication to be filed *nunc pro tunc?* This is a question in which the defendants can feel no interest. *Quacunque via data*, the law is with them. If the replication is received now, then it admits the sufficiency of the plea, if the matters pleaded be true, and the truth of them is incontestible. Of course the chancellor erred in overruling the plea, instead of decreeing that "the suit, so far as the plea extends, is barred," as all the authorities explicitly tell us. If on the other hand a replication cannot be received in this court, *nunc pro tunc*, then, most obviously, the case before the court is one which has never been ready for hearing. The complainants, who alone could do it, have never put the cause at issue; and this being the case, is it a question which in a court of *dernier resort* it would be respectful to argue, whether a decree in favour of the complainants, pronounced in a cause before the parties are at issue in that cause, can be affirmed?

2. It seems that *M'Donald* and *Ridgely* also endorsed the notes of *S. Chase*, junior, and that *N. G. Ridgely*, of that firm, is the same *N. G. Ridgely* to whom the deed of 1809 was executed by *S. Chase*, senior. The question is, is the property conveyed by *S. Chase*, senior, answerable not only for the whole amount of endorsements by the individual *N. G. Ridge-*

ly, but also for the endorsements by the firm of *M'Donald* and *Ridgely*, and this merely because he was a partner of that firm? The decree answers the question in the affirmative, and for the reasons set forth. A particular examination of these reasons is deemed to be unnecessary, because the question itself has been too well and too long settled, now to be deemed *vexata questio*. The complainants, in order to sustain this claim, must treat this deed as a mortgage, and insist that they have a right to *tack* to the mortgage debt, this other debt, because it is due to the mortgagee, as well as to his partner, who is no party to that mortgage. Let it be assumed for the present that the deed of 1809 is a mortgage, and that this second claim, which it is proposed to *tack* to the original debt, was in fact due to the mortgagee himself individually, and (which it certainly is not,) a debt due from the mortgagor, the proposition to be maintained on the part of the complainants in the court below is, that the assignees of the equity of redemption can only redeem the property upon payment of both these claims. How many centuries have gone by since the law of this part of the case was conclusively settled? The defendants are either purchasers or mortgagees of the equity of redemption. The law upon this subject, as it has long been settled, and will be found in all the authorities, is stated by *Crüise*, tit. *Mortgages, ch.* 3, *s.* 27, 28, 34. It is now settled, that a bond (given by mortgagor to mortgagee,) cannot be tacked to a mortgage, even as against the mortgagor, though the heir at law can redeem only by paying both debts. Not against a purchaser or assignee of the equity of redemption, who may redeem without discharging a bond debt due to the mortgagee; because, the lands *in the hands of the alienee* can be charged with nothing but what is an immediate lien thereon, which the bond is not. They referred to *Francis's Maxims*, 2, 7. *Brace vs. Duchess of Marlborough*, 2 *P. Wms.* 491. 1 *Pow. on Mortg.* 391, 398, 399, 400. *Lowthian vs. Hasel*, 3 *Bro Ch. Rep.* 163. *Anonymous*, 3 *Salk.* 84. *Straton vs. Rastall*, 2 *T. R.* 366, 370. *Hayes vs. Ward*, 4 *Johns. Ch. Rep.* 130. It is then the settled law that these premises in the hands of the alienees of the equity of redemption cannot be charged with the payment of the debt due to *M'Donald* and *Ridgely*, nor with the payment of any debt due to *N. G. Ridgely* individually, other than that which it was the avowed object of the deed to secure. Upon this point the appellants place no reliance on the letters of *N. G. Ridgely* to be found in the record. It is at once admitted that they cannot be used to interpret the contract between him, and *S. Chase*, senior, or to ascertain his rights under the deed. It is by established principles, and rules of construction, not by the opinions, recollections, or forgetfulness of *N. G. Ridgely*, that the question is to be decided.

3. The *third* point is one which will require a more particular consideration. *N. G. Ridgely*, the person to whom the deed of 1809 was executed, has been obliged to pay some notes drawn by *S. Chase*, junior, and which were endorsed by *Ridgely*. Can he resort to this property to reimburse any, and if any, what part of this money? The authorities already cited prove that he cannot claim more than the $10,000, with interest. Can he claim that? These facts are proved in the record, and will not be denied—A few days after the execution of the deed of 1809, the loan, which the deed tells us was then about to be negotiated, was actually negotiated. Notes drawn by *S. Chase*, junior, payable to *T. Chase*, and endorsed by *T. Chase* and *N. G. Ridgely*, amounting to $10,000, were discounted by the *Union Bank of Maryland;* and for the amount of that loan, the payment of the debt then contracted, it will not be contested by us, that this property is answerable. Of that debt $5,000, it is expressly proved, was discharged by *T. Chase*, after (one or the second) renewal. When the other $5,000 were paid, or how paid, it does not appear. But it is in proof that the *Union Bank of Maryland* has now no such claim—that the debt has been discharged there; and it will not be pretended that *N. G. Ridgely* has been called upon by that bank, or any assignee of that bank, to pay one cent of the debt, which the deed of 1809 informs us was then about to be negotiated. On our part it will not be denied, that notes to a large amount drawn by *S. Chase*, junior, and endorsed by *N. G. Ridgely*, were negotiated at the *Union Bank*. All of them, it is in proof, were discharged some ten or twelve years ago, and none of them paid by *N. G. Ridgely*. Again, it is a fact admitted in the case, that *S. Chase*, junior, some years

subsequently to the deed of 1809, became largely indebted to the *City Bank of Baltimore*; that *N. G. Ridgely* was one of the endorsers of his notes. These notes, however, were not payable to *T. Chase*, but to *N. G. Ridgely*. And it is further admitted, that these notes *Ridgely* has been obliged to pay. On the part of the appellees it may be contended, that the debt contracted with the *City Bank*, and the funds thereby obtained, enabled *S. Chase*, junior, to pay off the debt due to the *Union Bank*. With respect to which we have only to say, there are circumstances which may be thought to render this probable, but there is no proof of it. It is at best but *conjecture*. Further, according to our view of the law, it is wholly unimportant whether this be proved or not, there being no proof that *S. Chase*, senior, ever consented that his property should be made answerable for any debt contracted, no matter *when* or *for* what *purpose*, with the *City Bank of Baltimore*. The deed, and nothing but the deed, must explain the meaning of the parties to it. The essential parts, in the discussion of the question, are the recital and the proviso. It is a deed executed by *S. Chase*, senior, to *N. G. Ridgely*, and professes to convey to the latter certain lots in the city of *Baltimore* belonging to the former. For what purpose was it executed? "Whereas *Samuel Chase*, the younger, and *Thomas Chase*, of *Baltimore* county, sons of the said *Samuel Chase*, the elder, are about to obtain a loan of ten thousand dollars from the *Union Bank of Maryland*, on notes drawn by the said *Samuel Chase*, the younger, payable sixty days after date to the said *Thomas Chase* and the said *Nicholas G. Ridgely*, and which said notes are to be renewed from time to time as the same become due. And whereas the said *Samuel Chase*, the elder, hath agreed to secure the payment of the said notes, and to indemnify the said *Nicholas G. Ridgely* for the endorsement of said notes, or any of them." Such is the recital of the deed. It then describes the property to be conveyed by it, and afterwards comes the proviso or condition in these words: "Provided always, and it is the true intent and meaning of these presents, and of the said parties hereunto, that if the said *Samuel Chase*, the elder, *Samuel Chase*, the younger, and *Thomas Chase*, or either of them, their heirs, executors or administrators, shall at all times hereafter save harmless and indemnify the said *Nicholas G. Ridgely*, by reason of any endorsement made by him of the notes of the said *Samuel Chase*, the younger, not exceeding the said sum of ten thousand dollars, then," &c. The bill of complaint carefully avoids all notice of the recital in the deed, which shows beyond all question the intent of the parties, and for what debt the elder Mr. *Chase* was willing to make his property responsible. It may safely be admitted by us, that the expressions of the proviso or condition, *but for the recital*, would have charged this property with the payment of any debt, (not exceeding $10,000,) which *S. Chase*, junior, contracted, even at another time and from another bank. But the recital confines it to a particular debt. A debt *then*, not years hence, only then about to be contracted to secure the payment, when it was demanded, of a sum of money which was to be borrowed, not of any person nor yet of any banking institution, but of one bank alone, the *Union Bank of Maryland*, and a debt of $10,000, and no more, which was to be borrowed only of the *Union Bank*, and not upon notes drawn and endorsed, no matter by whom, but "on notes drawn by the said *Samuel Chase*, the younger, payable sixty days after date to said *Thomas Chase*, and endorsed by said *Thomas Chase*, and a certain *Nicholas G. Ridgely*, and which notes are to be renewed from time to time," &c. It is contended that this deed is an indemnity offered to *N. G. Ridgely*, only to induce him to endorse particular notes, to be negotiated at a particular bank, and that before he can claim a sale of this property by virtue of this deed, in order to repay monies which at any time he may have been obliged to pay for *S. Chase*, junior, he must prove not merely that he has been compelled to pay money for *S. Chase*, junior, but that the money which he was thus compelled to pay, was a part of the very debt spoken of in the deed of 1809—a debt of $10,000 then about to be contracted with the *Union Bank of Maryland*, and to be evidenced by notes drawn by *S. Chase*, junior, sixty days after date to *T. Chase*, and endorsed by *T. Chase* and *N. G. Ridgely*. If this proposition be sustained by us, *Ridgely* clearly has no title to relief. The debt which he claims to have paid was a debt contracted with a bank, not in existence till years after this debt was contracted, and the notes were drawn payable, not to *T. Chase*, but to *N. G. Ridgely* himself. In 3 *Cruise's Digest*, *sect.* 8, page 416, *(American edition,)* it is laid down, that where there is a particular recital in a deed, and general words of release are inserted, the generality of the words shall be qualified by the recital. So also 1 *Pow. on Cont.* 390. "The principle is, that the matter in hand is always presumed to be in the mind and thoughts of the speaker, (or writer,) *though his words seem to admit a larger sense*, and therefore *the generality of the words used, shall be restrained by the particular occasion.*" Now if this be the law, as it certainly is, is it possible to misunderstand the meaning of the parties, or to doubt the true construction of this deed? Why is it executed? Because *S. Chase*, junior, and *T. Chase*, are about to borrow money of a particular bank; and because *N. G. Ridgely* is to be one of the endorsers of the notes, which that bank is to discount; and because the elder *S. Chase* has agreed to secure the payment of this debt, and to indemnify *N. G. Ridgely* for the endorsement of the *said* notes, or any of them. This is the avowed and only purpose of the parties to the deed; and when in the proviso it is declared that the deed shall be of no effect if *N. G. Ridgely* should be saved harmless and indemnified by reason of *any* endorsement made by him of *the* notes of *S. Chase*, junior, the law as well as common sense, confine these expressions to the notes spoken of in the recital, to the notes which are then to be negotiated, and the notes which from time to time are to be the renewals. Such was the matter in hand, and such matter only was in the minds and thoughts of the parties. If then the case was *res integra*, one would suppose it was impossible for a rational mind to entertain a doubt upon it. But it has repeatedly, and in different courts, been adjudicated, and the claim of *N. G. Ridgely* is at war with decisions which all courts are bound to respect.

This deed is not a mortgage. The grantor in it is no debtor of *N. G. Ridgely*. But a debt is about to be contracted by a third person—*N. G. Ridgely* may eventually be the creditor of that third person, and the grantor of the deed makes his property, not himself, responsible for the debt. The grantor undertakes to secure, as far as the property conveyed will secure, a particular debt, and he takes especial care to say what debt he does mean to secure. It is a debt then about to be created—a debt to be due from *S. Chase*, junior, and *T. Chase*, to the *Union Bank*, and which *N. G. Ridgely* may be bound to pay. That debt *N. G. Ridgely* has never been called upon to pay. Every cent of it has been paid, perhaps a part by *S. Chase*, senior—certainly not a cent of it by *N. G. Ridgely*. But *N. G. Ridgely* became surety for another debt, to another creditor, and insists that he is to be indemnified against any loss which he may sustain by reason of his endorsement of other notes, because for the benefit of the same persons. *Arlington vs. Merricke*, 3 *Saund.* 403, was an action of debt upon a bond, which recited that the postmaster general, who was the plaintiff, had deputed a third person to be his deputy postmaster *for six months.* The condition was for the faithful execution of the office by that third person, *during all the time that he should continue postmaster.* He was continued more than six months in the office, and for his default made after the six months had expired, the suit was brought against the surety. Now it is utterly impossible that the property conveyed by the deed of 1809 can be answerable, except for the debt then created, and for a debt due to the *Union Bank*, unless the surety was responsible in the case referred to. The condition here makes him responsible for the faithful execution of the office *during the time* that the deputy remained in the office, and during a part of the time, and after the six months expired, he made default. Yet the surety was held not to be liable. Why? The court held, that the *general words of the undertaking were confined to the time mentioned in the recital.* It is utterly impossible to charge the property conveyed by the deed of 1809, and by virtue of that deed, with one cent of the debt due from *S. Chase*, junior, to *N. G. Ridgely*, without overruling the decision of *Arlington vs. Merricke.* Will the court take upon itself to overrule that decision? In *England*, in different ages, by all its courts, it has been recognized as good law. In this country the correctness of it is yet to be questioned. It is in all the books, and by all the judges spoken of as the "leading case upon the subject"—never to be departed from. The same doctrine had been sanctioned in the previous case of *Horton vs. Day*, 22 *Car.* I, referred to by one of the judges in the argument. *Bartlett vs. Attorney General*, in 1709. *Bowdage vs. Attorney General*, in the same year. So also in a yet stronger case, *Liverpool Water Works vs. Atkinson*, 6 *East*, 507, where the bond in suit recited that the defendant himself had agreed with the plaintiffs to collect their revenues "from time to time *for twelve months*;" and the condition was that he should account *at all times* thereafter, "during the continuance of such his employment, or for so long as he should continue to be employed." The court considered themselves governed by the case of *Arlington vs. Merricke*, and that the general terms of the engagement were restrained by the time mentioned in the recital. See also the case of *Pearsall vs. Summersett*, 4 *Taunt.* 593. The cases of *The Wardens of St. Saviour's Southwark, vs. Bostock*, 5 *Bos. & Pull.* 175. *Hassell & Clark vs. Long*, 2 *Maule & Selw.* 363. *Wright vs. Russell*, 2 *W. Blk. Rep.* 931. S. C. 3 *Wils. Rep.* 532, 539; *and Grant vs. Naylor*, 4 *Cranch*, 224, 234—all of them expressly affirming the doctrine for which we contend. Here the property conveyed is made answerable for one particular debt—for notes carefully described, and *then* (not from time to time,) to be negotiated. It is an undertaking by a third person to secure, as far as the property would secure, the debt of another, and the words of the deed must receive the same construction that would have been given to them if *S. Chase*, senior, had executed a bond containing the same recital and condition. It cannot be said that the cases cited do not apply, because they are decisions at law, and this a case of equity. The rules of construction are the same in courts of law and of equity. The court say, in *Wright vs. Russell*, 3 *Wils.* 539, "courts of equity are favourable to securities; for where they are not strictly bound at law, equity will not bind them." The debt then which *S. Chase*, senior, engaged should not be paid by *N. G. Ridgely*, was a debt due to the *Union Bank of Maryland;* and no such debt has *Ridgely* paid. He has made himself responsible for other debts contracted by the same individual, but those are debts not mentioned in the deed. Treat the deed as a mortgage executed by the debtor himself, and then the mortgage debt is paid off. Can the mortgagee claim that the mortgaged premises be sold to pay another debt, not provided for in the deed? In *Kirby and others vs. The Duke of Marlborough and Coburn*, 2 *Maule* & *Selw.* 18, it was held, that a bond entered into by the defendants to the plaintiffs, to enable *Coburn* to carry on his trade, conditioned for the payment of all such sums not exceeding £3000, which should at any time thereafter be advanced by the plaintiffs to *Coburn*, was not a continuing guarantee to the extent of £3000 for advances made at any time, but only a guarantee for advances once made to the extent of £3000. So also in *Rogers vs. Warner*, 8 *Johns. Rep.* 92—"If D wishes to take goods of you on credit, we are willing to lend our names as securities *for any amount* he may wish." D took goods on credit several times, and paid for them. About 18 months after the letter of credit was dated, he purchased upon credit other goods, for which he did not pay—Decided, that the letter of credit did not extend beyond the first parcel of goods. But it has been asked, what difference did it make to the elder *S. Chase*, with whom the debt was contracted? Perhaps if it were necessary, it could be shown there were many and good reasons why he should insist that the debt, for which he was answerable, should be contracted with the *Union Bank*, and no where else. But it is not necessary to assign a reason for it. *Sic volo, sic jubeo*, is the language of Mr. *Chase*, and *stat pro ratione voluntas*, says the law in this case. He had a right to say to the endorser of these notes—If you wish me to indemnify you, take care of whom the money is borrowed—take care by whom the notes are drawn—to whom payable, and by whom they are endorsed; and take care, too, that the notes thus to be drawn, endorsed and negotiated, do not exceed $10,000. All these directions are disregarded. He endorses notes to a much larger amount. The debt actually contracted at the time is paid off. The money now claimed was money borrowed, it is not known when or for what purpose. All that we learn about it is from *N. G. Ridgely* himself, that he did endorse the paper, because the deed of 1809 had been executed.

Taney, *Moale* and *R. Johnson*, for the Appellees. 1. It is not the practice in our court of chancery to put in a replication where a commission to take testimony (as in this case,) is issued by consent. Such consent is a waiver of a replication. But if consent is not given by the parties to issue a commission, then, as a mere matter of form, the register puts in the replication, and makes up the issue. If the plea is proved to be true, then it is a bar to the action; but the plea in that case must be to the whole of the bill. Here it is not. 2 *Madd. Chan.* 299. The plea not being replied to, the benefit of denial is reserved for final hearing. *Cooper's Plead.* 233, 229. 2 *Com. Dig.* tit. *Chancery*, (I 2,) 274, cites *Abr. Ca.* 41.

2. The notes for $7,665 and for $18,000, can be tacked to the mortgage of 1809. They were all negotiated partly at the *Union Bank*, and the whole afterwards at the *City Bank*. This is admitted in the answer. If a third mortgagee buys in the first mortgage, he can tack his third mortgage to the first, and come in, in preference to the second, for his debt due on the third. So where the first mortgagee lends money, or makes advances, looking to the mortgaged premises as security, he can tack the amount of the advances to his mortgage. *Pow. on Mortg.* 532 *Ex parte Hearn*, 1 *Buck on Bankruptcy*, 165.

The recitals in the deed from *T.* C*hase* to *R. M.* C*hase*, are evidence against the defendants of the existence of the deed from *S.* C*hase* to his sons, *S.* and *T.* C*hase*. When a mortgagor redeems the mortgaged premises he must pay the mortgage debt, and all advances. 1 *Eq. Ca. Ab.* (G) pl. 1.

R. M. C*hase* and *The Farmers' Bank* did not lend their money with a view to this property. C*ooper's Plead.* 281, 282. *Sugd.* 543, (and *notes*,) 393. *Berry vs. Mutual Insurance* C*ompany*, 2 *Johns.* C*h. Rep.* 608. The right of tacking is to prevent a circuity of action.

3. *R. M. Chase* was bound to take notice of the deed of 1809, and he was therefore a purchaser with notice. Every thing calculated to put the party upon inquiry is notice. *Sugd.* 498, 542. The laws directing the recording of deeds were for the purpose of giving notice. *Mertins vs. Jolliffe, Ambl.* 313. *Taylor vs. Stibbert*, 2 *Ves. jr.* 440. *Jennings vs. Moore*, 2 *Vern.* 609. *Daniels vs. Davison*, 16 *Ves.* 249. *Frost vs. Beekman*, 1 *Johns. Ch. Rep.* 299. *Tucker vs. Woods*, 12 *Johns. Rep.* 190. *Billington's Lessee vs. Welsh*, 5 *Binney's*

Rep 134. 2 *Fonbl.* 151. A purchaser without notice cannot avail himself of it without relying upon it in his answer. 2 *Madd. Ch.* 323. 2 *Eq. Ca. Ab.* 682, (*note* b.) *Harris vs. Ingledew*, 3 *P. Wms.* 91. *Moore vs. Mayhew*, 1 *Ca. in Chan.* 34.

The complainants are *recti in curia*. When the bill was filed they had paid one note, and discounts upon others, to an amount of upwards of $5,000. *Ranelaugh vs. Hays*, 1 *Vern.* 190. *Lee vs. Rook*, *Mos.* 318; and *Norwood vs. Norwood*, 4 *Harr. & Johns.* 112.

The *City Bank* might have filed the bill, but as they did not, the complainants could do so.

Curia adv. vult.

STEPHEN, J. at this term delivered the opinion of the Court. [After stating the allegations in the bill, answers and plea, he proceeded as follows:]

In this case several important principles of equitable jurisprudence present themselves for the consideration and decision of this court. Among them will be found the doctrine of tacking, as it is termed by the writers on chancery law, which gives a mortgagee or incumbrancer, under certain circumstances, the right, not only to have the debt, secured by a mortgage, satisfied out of the mortgaged property, but also other claims or demands which the mortgagee may have against the mortgagor, although the property mortgaged is in nowise made expressly responsible therefor. To what extent this principle is to operate upon the rights of the parties now before this court, is a question of considerable interest and importance to them. By the decree of the chancellor, from which they have appealed, the doctrine has been recognized as bearing upon this case, and applied in its fullest latitude. And the duty now devolves upon this court of reviewing that decree, and of determining whether the extent, to which it has been carried, be justifiable upon authority, and the special circumstances of this case.

It is indisputably true, that the right of tacking is not founded upon contract or express stipulation, but has its foundation principally, if not exclusively, in the policy of the law, which is ever solicitous to prevent a multiplicity of suits, and avoid a circuity of action. By the civil law, the mortgage is properly a security only for the debt itself for which it was given, and the consequences of it, as the principal sum and interest, and the costs and damages laid out in preserving it. But according to the equitable jurisprudence of the *English* law, the rule is, that he who will have equity to help him, where the law cannot, shall do equity to the party against whom he seeks to be relieved. 2 *Fonbl.* 272.

According to the principles which will govern the decision of this case, it is not indispensably necessary to decide upon the truth of the much controverted fact, whether *T. Chase* participated in the loans obtained from the *Union* and *City Banks* or not; as the result of this cause, according to the view which has been taken of it by this tribunal, will not essentially depend upon that fact. Even if he did so participate, can his moiety of the property mortgaged by his father to *N. G. Ridgely*, which was subsequently conveyed to him, and by him conveyed to *R. M. Chase*, be made responsible for more than the sum secured by the mortgage of the 21st of October 1809? That deed of mortgage was executed to *N. G. Ridgely* as an indemnity to him against any loss which he might sustain in consequence of his endorsements for his (the mortgagor's) two sons, *S.* and *T. Chase*, to an amount not exceeding the sum of $10,000. If *S. Chase*, the mortgagor, were now living, and this proceeding had been instituted against him to make the mortgaged property responsible to a larger amount than that stipulated by the deed, can it be believed that the attempt would eventually prove to be successful? As against a surety the contract cannot be carried beyond the strict letter of it. It cannot be extended by equitable construction. *Straton vs. Rastall*, 2 *T. R.* 370. In support of the same doctrine, that a surety is not liable beyond the letter of his engagement, see *Wright vs. Russell*, 3 *Wils. Rep.* 539. A surety, who becomes bound for the good conduct of a clerk to A, is not bound to him and a partner subsequently taken into partnership. In this last case the court say, courts of equity are favourable to sureties, for where they are not strictly bound at law, a court of equity will not bind them. That the undertaking of a surety shall be construed strictly—see also *Melville vs. Hayden*, 5 *Serg. & Lowb.*

3 9. By the express agreement of the parties, the mortgagor's liability was not to exceed the sum of $10,000; and *N. G. Ridgely* would have no right to look to the land, mortgaged as his security, for any responsibilities which he might incur over and beyond that amount. The rule "*expressum facit cessare tacitum*," would be strictly applicable to such a case, and would effectually exclude any claim founded upon the principle of tacking.

If then *S. Chase*, the mortgagor, would not be responsible for more than the sum secured by his deed of indemnity, what is there in the case, which so peculiarly affects his assignees in point of equity, as to subject them to a greater liability? *S. Chase*, one of the defendants, it is true, by his deed of the 1st of February 1819, mortgaged his part of the wharf property conveyed to him by his father, and a part of a tract of land called *Elizabeth's Diligence*, to *M'Donald & Ridgely*, and *N. G. Ridgely*, to secure them for their endorsements on his behalf. So far then as respects him, the case is clear that he has made his property liable beyond the sum expressed in the original mortgage, by express contract. It is not necessary then to call in aid the principle of tacking to make his property answerable to the complainants for the extinguishment of their claim. The decree of the court below, therefore, as respects him, is perfectly correct, and consistent with the principles of law, equity and justice. But so far as it has reference to the case of *T. Chase*, it presents to this court a very different aspect. He has encumbered his property by no express contract or stipulation with the complainants, or either of them; and if it is to be charged at all with the payment of their demands, it must be by resorting to the doctrine of tacking, according to the principles which prevail in courts of equitable jurisdiction. Can his moiety of the property mortgaged by the deed of his father in 1809, to *N. G. Ridgely*, under the circumstances of this case, and according to those principles, be made responsible in the hands of *R. M. Chase*, his trustee, for a greater amount than the sum of $10,000, secured by that mortgage, with interest? In order to solve this question, and arrive at a just conclusion upon this part of the case, it is essentially important to ascertain whether or not *N. G. Ridgely*, or *M'Donald* and *Ridgely*, when they endorsed the notes of *S.* *Chase* with *T. Chase*, looked to the land mortgaged by *S. Chase* in his lifetime to *N. G. Ridgely*, as a security or indemnity to them, beyond the amount specified in that mortgage? If they did not, it would seem to follow as a necessary consequence from the established principles of chancery jurisprudence, that the doctrine of tacking cannot be brought to bear upon their case. That they did not incur such responsibilities upon the immediate credit of the land mortgaged, it is only necessary to advert to some of the facts and circumstances proved in the cause. In a letter addressed by *M'Donald* and *Ridgely*, and written by *N. G. Ridgely*, to *S. Chase*, the writer, *(N. G. Ridgely,)* expressly states, that he had entirely forgotten that a mortgage had ever been executed to him by *S. Chase*, deceased, until he had been reminded of that fact by the letter of *S.* *Chase*, one of the defendants. In this letter are likewise the following strong expressions: "Indeed, so unbounded was our confidence, that we never had looked into the papers which you had given us as security, until the day we showed them to Mr. *Moale.*" In the same letter are also to be found the following expressions: "As the security now stands, the $10,000, endorsed by our *N. G. R.* is amply secured. The balance of $28,000 might have been amply secured, as the property would have sold two years ago; but as it may sell, (excluding *Tommy's* house as you propose,) 1, 2, 3 or 4 years hence, it may be very far short of ample security." Again, if they endorsed upon the credit of the property mortgaged by the deed of 1809, and considered that to be liable, why on the 1st of February 1819 take a mortgage from *S* *Chase* of his moiety of the same property? And why, in the deed of the 1st of March 1820, agree to secure to *T. Chase*, in the first instance, $15,000 out of the proceeds of sale of his part of the wharf property, before any part thereof should be applied to the exoneration of *M'Donald* and *Ridgely*, or either of them, from their responsibilities? These circumstances are strongly indicative of the fact, that they never did rely upon or look to the land as the means of their indemnity, when the endorsements exceeded the sum of $10,000, secured by the original deed of mortgage.

In *Brace vs. Duchess of Marlborough*, 2 *P. Wms.* 491, upon the subject of tacking, we find the law stated to be, if a judgment creditor buys in the first mortgage, he shall not tack or unite this to his judgment, and thereby gain a preference, because the judgment creditor does not lend his money upon the immediate view or contemplation of the real estate. In the same case there is stated to be a difference in the law, where a third mortgagee buys in a statute which is the first incumbrance, and where a statute creditor, being the third incumbrance, buys in the first mortgage; in the latter case the statute or judgment creditor, because he did not lend his money on the credit of the land, shall not unite the first mortgage to his statute or judgment; but in the former, as the land was in the view and contemplation of the lender, he shall be allowed to unite the statute to his third mortgage. If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage and statute or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured a further sum on a security, which, though it past no present interest in the land, yet must be admitted to be a lien thereon. *Brace vs. Duchess of Marlborough*, 2 *P. Wms.* 493. *Shepherd vs. Tilley*, 2 *Atkyns*, 351. But where a prior incumbrancer has a bond likewise, he cannot insist upon being paid both, which would be a prejudice to the puisne incumbrancer; but his bond shall be postponed to all other incumbrancers, whether by mortgage, judgment or statute staple, for he has not the same equity against a puisne incumbrancer, as against an heir at law, who is liable in respect of assets. These cases are cited, and the principles therein referred to, for the purpose of showing, that one of the grounds upon which the doctrine of tacking materially rests, is that the party, when he advances his money, does it upon the credit of the real security, and looks to that for payment or reimbursement. Instances or examples in further illustration of this principle, might be multiplied to a considerable extent; but the limits to which this opinion has already swelled, admonish me that it is time to draw to a conclusion.

But put the claim of the complainants upon the most favourable footing, and suppose the bill in this case to be filed by them against *T. Chase*, as mortgagor, to foreclose the mortgage, can it be contended that they would have a right to tack their claims, to the prejudice of other creditors; that they would not, see *Lowthian vs. Hasel*, 3 *Brown's Chan. Rep.* 162, where Lord Chancellor *Thurlow* said, "the only reason why the mortgagee can tack his bond to his mortgage is to prevent a circuity of suits; it is solely matter of arrangement for that purpose, for in natural justice the right has no foundation. The principle explains the rule; and therefore it can go no further; the creditor having another specific security, cannot give him, in justice, any priority. There being no foundation in justice, the only question is, whether the court is in the practice of doing it; and it has not done it in any case but that of the heir at law, and merely to prevent circuity." So also in *Hamerton vs. Rogers*, 1 *Ves.* jr. 513, a bill of foreclosure was dismissed, with costs, so far as it sought to tack a bond to a mortgage against creditors. The principle was considered to be too clear to admit of argument.

But is the right of tacking admissible in this case upon another ground? In 1 *Madd. Chan.* 525, the principle is stated to be, that a distinction prevails between a bill to redeem, and a bill to foreclose; for in the latter case the mortgagee cannot insist on tacking his subsequent debt, as he may do on a bill for a redemption. See also the *Note* to *Coleman vs. Winch*, 1 *P. Wms.* 776. The rule in the latter case is, that he who seeks equity must do equity; for he who will have equity to help him, where the law cannot, shall do equity to the party against whom he seeks to be relieved. 2 *Fonbl.* 272.

The only remaining point relied upon in the discussion of this cause, which it is proper to consider and decide, is the plea in bar founded upon the deed of the 1st of March 1820. In the case of *Thompson vs. M'Kim*, 6 *Harr. & Johns.* 332, this court have said, "the constitution and principles of the court of chancery in this state, as in *New York*, originally emanated from the court of chancery in *England*, from which source we derive our principal stock of information in chancery jurisprudence; and the general rules governing the court of chancery there, so far as they are applicable, have been adopted here, and are constantly practised upon." Pleas are a species of defence in equity, not so frequently relied upon in this state as in *England;* but when resorted to by a defendant, the rules which have been adopted in that country, in relation to them, must be considered as applicable here. In *Mitford's Plead.* 15, he says, "a plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea." 2 *Madd. Chan.* 295. Although the books say, that where a plea is set down for argument, the facts stated in it are admitted to be true, (*Mitford* 198,) yet such admission is not conclusive upon the plaintiff, but is presumed to be made for the purpose of testing the validity of the plea in point of law, founded upon such facts, supposing them to be true. If the plaintiff replies, and takes issue upon the facts of the plea, he admits its legal sufficiency; and if the facts are found to be true, the complainants' bill must be dismissed, with costs. *Mitford*, 241. 2 *Madd. ch.* 295. In this case the plea was not set down for hearing, and consequently no judgment of the court was had upon its sufficiency; nor does it appear that any replication was ever filed, by which its sufficiency would be admitted. If in *England* the defendant does not set down his plea to be argued within eight days after it is filed, it is considered as abandoned, and the plaintiff is entitled to costs. 2 *Madd. Chan.* 295. *Jordan vs. Sawkins*, 3 *Bro. Chan. Rep.* 372. But in adverting to the rule established in this case, it is not intended to adopt it as applicable to the practice of the court of chancery in this state.

From these principles, and the authorities cited in support of them, it follows, as a necessary consequence, that the plea filed in this case did not operate to bar the plaintiffs' suit.—DECREED, That the decree of the court of chancery, except as hereinafter excepted, be reversed, with costs to the appellants by them incurred in this court. *Decreed* also, that there is now due to the appellees, the sum ascertained to be due by the said decree, together with legal interest thereon from the date of the said decree; and that for $10,000, a part of the said sum, together with legal interest upon the said $10,000 from the 29th of August 1819, the whole of the property and estate mentioned and contained in the deed of mortgage from *Samuel Chase*, deceased, to *Nicholas G. Ridgely*, one of the appellees, of the 21st of October 1809, is first responsible and bound for; and that for the balance of the said sum, with interest as aforesaid, the moiety of the said property and estate in the said deed of mortgage of 1809, which belonged to, and was the right of *Samuel Chase*, one of the appellants, as also all the property to which the said *Samuel Chase* was entitled, and by him conveyed to the appellees, by his deed of the 1st of February 1819, except such parts of the said last mentioned property as is contained in another deed from the said *Samuel Chase* to *Richard M. Chase*, one of the appellants, of the 30th of August 1817, is also first responsible and bound for. *Decreed* also, that the chancellor pass all and every such order and decree in the premises as may be necessary to carry into effect the present decree; and that nothing herein contained shall be held or construed to affect, or in any way impair, any right which any purchaser or purchasers may have acquired to any part of the property decreed to be sold by the decree of the court of chancery in this case, under any sale or sales which may have been made of such property under or by virtue of the said decree, and under the authority of the said court of chancery; but that any such right shall be, and is hereby decreed to be, as good and valid as the same would have been, in case the said decree of the court of chancery had been in all things well and truly affirmed by the present decree of this court, or as it would have been if the said decree had not been appealed from. Nor shall the present decree be construed to affect, or in any way impair, any distribution of the proceeds of any such sale or sales, which may have been made in the court of chancery, and which may not be inconsistent with the provisions of the present decree.

DECREE REVERSED, &c.

BOYLE *vs.* ROBINSON, *Bail* of COULTER & FISHER.—June, 1826.

A *scire facias* was issued against R, as special bail of C & F, reciting, in the usual way, the recognizance of bail, and the judgment against C & F, &c. R appeared to the writ, and moved to quash it, upon the ground, supported by affidavit, that she had only intended to become bail for F, and that the clerk of the court had by mistake entered her as bail for both C & F—*Held*, that as the writ recited the recognizance of bail, the proceedings to judgment against the principal, &c. properly, as they appeared by the record, it could not be quashed for insufficiency.

The court below having quashed the writ, the judgment was reversed, and on motion, a *procedendo* awarded.

If the bail was relievable on motion, ought it not to have been made for rectifying the original entry, in which the alleged mistake in taking the bail occurred? *Quere.*

APPEAL from *Baltimore* County Court. In this case a writ of *scire facias* issued on the 12th of February 1822, reciting, that in *Baltimore* county court, on the third Monday of September 1819, *Eve Robinson*, (the appellee,) appeared personally in that court and became pledge and bail, in the usual form, for *John Coulter* and *John Fisher*, in an action on the case brought by *Francis Boyle*, (the appellant,) against the said *Coulter* and *Fisher*, and a certain *Samuel Hill*. That on the third Monday of September 1820, *Boyle* recovered judgment against *Coulter* and *Fisher*, for certain damages and costs, which damages and costs they had not, nor had the said *Hill* paid, nor had *Coulter* rendered his body to the public prison of *Baltimore* county in execution of the said judgment. The sheriff was therefore commanded to give notice to *Eve Robinson*, that she be and appear, &c. At the return day the sheriff returned the writ, "*made known*," &c. On this return the appellee appeared in court by her attorney, and moved the court, that the *scire facias* might be quashed for insufficiency; for that she, as special bail, was not liable to the judgment sought for by said writ; and she filed in court an affidavit, made on the 18th of February 1822, by the attorney of *Fisher*, one of the original defendants, stating that the sheriff made return of the writ in the original action, "*Cepi, Coulter & Fisher—N. E. Hill.*" That *Fisher* entered into a bail bond to the sheriff, with *Eve Robinson*, (the appellee,) as his security; and that *Coulter* also gave bond to the sheriff, with one *Scott* as his security. That *Eve*

Robinson came into court, with the deponent, for the purpose of becoming special bail for *Fisher;* and the deponent directed the clerk of the court to enter her as bail for *Fisher*, which was done; but the clerk made the entry general on the docket, by which it would appear that she was special bail for both defendants. The county court sustained the motion, and *quashed* the writ of *scire facias.* The plaintiff appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J.

Gill and *R. Johnson*, for the Appellant, contended, 1. That *Baltimore* county court had no authority to quash the writ of *scire facias.* 2. That the writ, and return thereof, were regular. 3. That there was no evidence showing that the appellee did not become the special bail of *Coulter* and *Fisher.* 4. That the record entry of the appellee as bail could not be contradicted, except by a sufficient plea. 5. That *Baltimore* county court in 1822 had no authority to alter the record of the original action of 1819, so as to change the record obligation of the special bail.

Mayer, for the Appellee, cited *Holland & Franklin's* case, 2 *Leon.* 184, 185. 1 *Vent.* 362; and 1 *Tidd's Pr.* 660.

Earle, J. delivered the opinion of the Court. This is the case of a *scire facias* against special bail, which was quashed, on motion, by the court below, for insufficiency, with costs to the defendant. An affidavit, filed in support of the motion, states, that a mistake had been committed by the clerk in taking bail to the action—in taking *Eve Robinson* bail for *Coulter* and *Fisher*, whereas she was bail for *Fisher* only; and this, it is presumed, induced the court to set aside the *scire facias*, which appears to have been issued to make the bail responsible for *Coulter.*

The writ recites the recognizance of bail, the proceedings to judgment against the principal, and all other facts and circumstances material to the case; and the return thereof being in all respects regular, the court cannot conceive how it could be quashed for insufficiency. That process cannot want sufficiency which conforms to the record, which is the foundation of it. If *Eve Robinson* appears on the record to have been the bail of *Coulter*, the writ is not to be deemed defective and erroneous, for stating her to be so.

It appears to the court, that the party's remedy has been mistaken in this case. If relievable on motion, it should have been made for rectifying the original entry in which the alleged mistake in taking the bail occurred; but whether it could have availed her or not, it is not for us at this time to decide. The subject is not regularly before us, and it has not therefore particularly engaged our attention. It is, however, certain, that as long as the record remains unaltered, the *scire facias* must be in conformity with it, and for being so, it cannot be pronounced insufficient.

JUDGMENT REVERSED.

R. Johnson moved for a writ of *procedendo*, or special mandate, to the court below, directing them to proceed in the case.

PROCEDENDO AWARDED.

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PANNELL & SMITH *vs.* THE FARMERS' BANK of MARYLAND, *et al.*—June, 1826.

On a bill praying a decree for the sale of mortgaged property for the payment of the mortgage debt, where the mortgage was not recorded in time—*Held* by *Johnson*, Chancellor, that in the distribution of the proceeds of sale, the mortgagees were not entitled to a preference over the creditors of the mortgagor, who became such subsequent to the date of the mortgage; but that they were so entitled in relation to prior creditors—*Held* further, that although this priority of the mortgagees did not extend to the subsequent debts of the mortgagor, yet that the mortgagees, being entitled to priority over previous debts, they were entitled to the benefit of those debts in the distribution of the proceeds of sale, so as to reduce the proportion of subsequent creditors to what it would have been if the previous debts had been fully allowed.

On an appeal by some of the creditors of the mortgagor, the appeal was dismissed, because there was no proof of their debts.

APPEAL from the Court of Chancery. The bill in this case, which was filed by *The President, Directors and Company, of the Farmers' Bank of Maryland*, *Robert H. Goldsborough*, and *Alexander C. Magruder*, against *Priscilla Hanson*, administratrix of *Alexander C. Hanson*, together with a statement of the case, appear in the following decree made by

JOHNSON, Chancellor, (March Term 1823.) *Alexander C. Hanson,* the intestate, desirous to obtain an accommodation at the *Farmers' Bank of Maryland,* with a view of procuring money to meet some pressing demands on him, applied to *Robert H. Goldsborough* and *Alexander C. Magruder,* to endorse a note for him for $3,000, to be discounted at the said bank, and for their indemnity promised to execute a mortgage. On this promise they were induced to become his endorsers, and the note for that sum was accordingly endorsed and discounted, and the money received by *Hanson,* the drawer. In pursuance of his promise, on the 20th of November 1818, a mortgage was executed by *Hanson* of certain personal property to indemnify *Goldsborough* and *Magruder,* and save them harmless as endorsers. The note has since been protested for nonpayment, and still remains unpaid. *Hanson* is dead, intestate, and without leaving property sufficient to pay the debts he owed at the time of his death. The complainants, in virtue of the mortgage, claim a preference over the creditors, and demand the application of the funds arising from the mortgaged premises to the payment of the note, to the utter exclusion of the other creditors.

The answer of the administratrix states the deficiency of the assets, and submits to the decision of the court, whether the complainants are entitled to the preference.

By a decree of the 2d of January 1822, the premises were ordered to be sold, and the trustee was directed to give notice to the creditors of the deceased to exhibit their claims; this has been done, and from the amount of the debts, and the proceeds of sales, it clearly appears, that the estate of the deceased was insufficient and inadequate to the discharge of the debts. The mortgage, without any fraudulent design, was omitted to be recorded. The questions arising in the cause are, whether or not the complainants are entitled to a preference, and to what extent?

The auditor, under the interlocutory decree passed in the case, and in pursuance of the directions of the decree, has returned two accounts, in the one applying all the proceeds to the complainants' debt, leaving, after the entire application, a considerable balance still due; in the other account the proceeds are applied equally, and of course greatly increasing the balance.

This case has been submitted on a few remarks on the part of the complainants, and by them the court is referred to the case of *Woods et al. vs. Fulton & Starck*, 4 *Harr & Johns.* 329, as an authority conclusive in favour of the preference. In the argument of that case, a claim to a preference on the part of the mortgagee, (whose mortgage was not recorded,) was claimed over other creditors; and authorities were cited to prove, that a creditor, who had become such in consequence of a previous promise of a mortgage to secure his debt, did in the court of chancery in *England* obtain a preference over general creditors. But I am at a loss to reconcile that adjudication with the favoured and equitable principle, that all the funds of a debtor ought equally to be applied to discharge his debts, and if deficient, that each of the creditors should bear a proportionable share of the loss—the rule invariably pursued by a court of equity when the funds to discharge debts are equitable assets. When one creditor has obtained a legal advantage, either in obtaining a judgment, or in procuring a mortgage, there as he has as much equity to have his debt paid as other creditors, having the law in his favour, he will prevail, for the equity being equal, the legal right preponderates.

But, except for the respectable authorities produced at the trial of the case of *Woods & others vs. Fulton & Starck*, I should have concluded, that a promise either verbal, or in writing, would not in equity entitle the creditor, to whom it was made, to a preference, to the exclusion of the other creditors. I should have drawn a distinction between enforcing *contracts* of sale, from *contracts to give a mortgage.* In the former, if the purchase money was paid during the life of the vendor, it constituted a fund for the discharge of his debts; if not paid, before a conveyance would be decreed to be made, the purchase money must be paid; of course, the enforcement of such contracts is only changing the nature of the funds, not diminishing of them injuriously to the interest of the creditors. But to give to him, who has only a contract for a mortgage, a preference over other creditors, so far as his claim extended, the funds are reduced, or may be totally destroyed as to the other creditors. I should have concluded, but for such authorities, that a court of equity would have said to him who claimed a preference under such a contract, you have no legal advantage over the general creditors, and therefore, if a loss is to be sustained on account of the deficiency of assets, you must with them bear your proportion.

In the opinion pronounced by the court of appeals, they carefully avoid sanctioning the doctrine of the authorities cited on that occasion; for in the opinion it is observed—"As the answers do not state the insufficiency of the estate of *Dennison*, to satisfy his creditors, or the insolvency of the firm of *Dennison & Savin*, (and to these points there is no proof in the cause,) the question of fraud, in reference to creditors, does not arise in the cause;" and "this view of the case renders it unnecessary for the court to decide on the true construction of the statute referred to, or to give any opinion on the question how far the defendant could call to his aid the provisions of the said statute, in a case where the complainant does not seek to record his mortgage, but claims relief under that branch of equitable jurisdiction which enforces contracts made *bona fide*, and for a valuable consideration."

The statute referred to in the above extract from the opinion of the court, is the act of 1785, *ch.* 72, *s.* 11; by this law it is enacted, "that in case any deed hath been, or shall hereafter be executed, to the validity of which recording is necessary by law, and such deed hath not been, or shall not be recorded agreeably to law, without any fraudulent design or intention of the party claiming under such deed," power and authority is given to have it recorded, under a decree of the court, and it is to have the same effect as if it had been duly recorded within the time prescribed; subject, however, to a proviso in the act, which among other restrictions, *is that it shall not in any manner affect the creditors of the party making such deed*, who may trust such party *after the date* of the said deed.

In the case now under consideration the complainants, it is true, do not apply to have the mortgage recorded, to the legal validity of which recording is necessary; but claim the benefit of the mortgage on the ground of a *bona fide* contract, to the exclusion of the other creditors of the mortgagor, who trusted him *after the date* of the mortgage deed.

If the party omitting to record the deed, can, by changing the *form* of the application to this court, exclude the beneficial parts of the act of 1785, *ch.* 72, *s.* 11, designed to secure subsequent purchasers and subsequent creditors, the law is made effectual to the exclusion of those provided for in the proviso, then whenever the estate of the mortgagor is insolvent, the application, founded on an unrecorded deed of mortgage, will be, to have the property sold, not for the deed to be recorded; and where can be the substantial difference between making the deed effectual against all persons by its being recorded under a decree, and selling both the legal and equitable interest in the mortgaged premises to a third person, and applying the whole proceeds to the discharge of the mortgaged debt? In reason there can be no difference; and therefore, my opinion is, that inasmuch as the creditors, who became such *after* the date of the mortgage, would not be excluded by its being recorded under a decree, so are they not deprived of a proportion of the money arising from the sale of the premises made in virtue of a decree.

It remains to be considered how the proceeds are to be distributed. On examining the statement of the auditor, and the vouchers of the creditors on which the statement is predicated, only one claim is presented that arose *subsequent* to the date of the mortgage; and as the mortgage, if recorded under a decree of the court, would have been, under the act of assembly, effectual against all *prior* creditors, so it appears to me, are they by the true construction of the act, excluded from the proceeds arising from the sale of the mortgaged premises. If the mortgage had not been executed, then the assets would have been divided amongst the creditors equally, and of course, the claim of *Edward Pannell*, could only on the distribution have entitled him to the dividend he is allowed in the report of the auditor. If his dividend was to be increased, in consequence of the claims prior to the mortgage being rejected, that would be extending to him the benefit of the mortgage; but he is not entitled to that benefit, it is solely and exclusively the privilege of the mortgagees; and therefore they, by the mortgage overreaching the prior creditors, have the benefit of those claims, to keep down *Pannell's* dividend, and to confine it to the same sum he would have been entitled to draw had the claims prior to the mortgage been taken into the dividend. The exceptions taken on the part of the complainants, to the report of the auditor, except so far as they relate to that part of the account returned with the report, applicable to the claim of *Edward Pannell*, be and the same are ruled good; and the proceeds, after the commission and costs are paid, are directed to be paid as follows: To *Edward Pannell*, the sum stated as his proportion, and the residue to *The President, Directors and Company, of the Farmers' Bank of Maryland*, in part of the note in the proceedings mentioned, that was discounted at the bank, and endorsed by the other complainants. From this decree *Edward Pannell*, and *Dennis A. Smith*, another creditor, appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J.

Taney and *Gill*, for the Appellants, contended—1. The Bank has no remedy against *Magruder* and *Goldsborough* but at law and on the note. The bill does not state facts sufficient to enable the bank to recover of *Magruder* and *Goldsborough* either at law or equity.

2. The complainants, *Magruder* and *Goldsborough*, have not been damnified by their security for *Hanson*. They do not show in the bill any liability on that securityship, and consequently have no present right to claim the proceeds of the mortgaged slaves, or any part thereof.

3. The bank, as a creditor of *Hanson*, has no right to call on his securities in equity, without showing a case in which *Hanson's* estate is liable to such sureties.

4. The bank cannot claim to avail themselves of the contract of indemnity between *Hanson* and his sureties, unless they show, (which they have not done,) that the sureties are liable for *Hanson*.

5. The principal creditor cannot claim, (on the principle of substitution,) to enforce an indemnity which his debtor has given to a mere surety; and no such right results from the contract on the discounted note.

6. The mortgage here is void, because there is no proof, nor

does it in any manner appear, that the property mortgaged was delivered to the mortgagees—the mortgage not being acknowledged and recorded.

7. In the bill, the bank, having no interest, was improperly made a party. The complainants, to succeed, must show an interest in all of them.

They cited 1 *Evans' Pothier*, 245, 252. *Kaimes Prin. Equity*, 84. *French vs. Bank of Columbia*, 4 *Cranch*, 141, 153. *Corney vs. Da Costa*, 1 *Esp. Rep.* 302. 1 *Chitty on Bills*, 262, 263, (Ed. 1818.) *Brown vs. Maffey*, 15 *East*, 216. Acts of 1729, *ch.* 8, *s.* 5; and 1785, *ch.* 72, *s.* 11. *Dorsey vs. Smithson*, 6 *Harr. & Johns.* 64. *East India Company vs. Henchman*, 1 *Ves. jr.* 287. *Wesley vs. Thomas*, 6 *Harr. & Johns.* 28.

Magruder, for the Appellees, cited 1 *Eq. Ca. Ab.* 93, (K) pl. 5. 1 *Bro. Civil Law*, 162. *Parsons vs. Briddock*, 2 *Vern.* 608. *Wright vs St. Alban*, 11 *Ves.* 22. Act of 1804, *ch.* 61, *s.* 26. *Dorsey vs. Smithson*, 6 *Harr. & Johns.* 63, 64. *Woods, et al. vs. Fulton & Starck*, 4 *Harr. & Johns.* 329.

THE COURT dismissed the appeal, there being no proof in the record of the claims of the appellants.

APPEAL DISMISSED.

* * *

BENSON'S Lessee *vs.* MUSSETER.—June, 1826.

G, being seized of two tracts of land called *C* and *W*, of which *W* was the eldest, devised *C* to *F*. and by a subsequent clause in his will directed that *W* should be sold for the payment of his debts. Under this direction *W* was sold to *M* The lines of the two tracts conflicted, and in an ejectment by the devisee of *C*, the junior tract, against *M*, to recover that part of *C* which was included within the lines of *W*, the elder tract—*Held*, that the plaintiff was not entitled to recover. That the true construction of the devise of *C* was, that the devisee thereof took only so much of that tract as was not covered by the lines of *W*, the elder tract.

Under a demise of an entire tract of land less than the whole may be recovered, but it must be an entire, and not an undivided interest.

APPEAL from *Frederick* County Court. Ejectment for a tract of land called *Convenience*. The defendant, (now appellee,) took defence on warrant, and plots were made. Issue joined on the plea of not guilty. At the trial the plaintiff gave in evidence the plots and explanations, made on his part, to show his claim and pretensions, and the patent for the tract of land called *Paris*, granted to *John Waters*, (son of *John*,) on the 4th of May 1752, for 100 acres. He also gave in evidence the patent for the tract of land called *Convenience*, located upon the plots, granted to *Thomas Johnson*, junior, on the 27th of July 1765, for 219 acres. The beginnings of both the said tracts, as located upon the plots, were admitted by the defendant to be truly located. The plaintiff also gave in evidence a deed from *Thomas Johnson*, junior, the patentee of *Convenience*, and of a tract of land called *The Resurvey on Wild Cat Hill*, to *Thomas Neill*, for *Convenience*, containing 219 acres, and for part of *The Resurvey on Wild Cat Hill*, containing 319 acres, dated the 6th of June 1776. Also the patent for *The Resurvey on Wild Cat Hill*, as located upon the plots by the defendant, granted to *Thomas Johnson*, junior, on the 25th of March 1765, for 1630 acres. Also a deed from *Thomas Neill*, for *Convenience*, and part of *The Resurvey on Wild Cat Hill*, which was conveyed to him by *Thomas Johnson*, junior, to *Gilbert Falconer*, dated the 30th of April 1778. He also gave in evidence the last will and testament of the said *Gilbert Falconer*, dated the 10th of July 1779, containing, among other devises, the following: "I give and bequeath to my son *Gilbert* all that tract or parcel of land known by the name of *Convenience*, lying and being in *Frederick* county, containing two hundred and nineteen acres more or less, to him and his heirs forever. *Item.*—It is also my will and desire, that all that tract or parcel of land, being part of a tract of land called *The Resurvey on Wild Cat Hill*, lying and being in *Frederick* county, containing three hundred and nineteen acres more or less, shall be sold at public vendue by my executor and executrix, and the money arising from the sale thereof to be applied in discharge of my just debts, and the overplus, (if any,) to be for the use of my family, in purchasing such necessaries of life as may be wanting for their support and maintenance. And lastly, I do constitute and appoint my son *Gilbert* and my dear wife, executor and executrix of this my last will and testament." The plaintiff also gave in evidence that *Gilbert Falconer*, the testator, soon after making the said last will and testament, died without revoking it, and that after his death, his son *Gilbert Falconer*, the devisee of *Convenience*, executed on the 17th of September 1779, a deed of bargain and sale to *John Benson*, the lessor of the plaintiff, for *Convenience*, described by courses and distances, and containing 219 acres, agreeably to the patent. The defendant then on his part gave in evidence a deed, dated the 30th of May 1780, from *Gilbert Falconer* and *Margery Falconer*, the executors named in the will of *Gilbert Falconer*, the father, to one *Worthington*, for part of *The Resurvey on Wild Cat Hill*, and which is the same part of said tract that was conveyed to *Gilbert Falconer*, the father, as herein before stated, describing the same by courses and distances, containing 319 acres. The defendant then prayed the court to direct the jury, that the plaintiff upon the whole evidence was not entitled to recover. Which direction the Court [*Shriver*, A. J.] gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN, ARCHER, and DORSEY, J.

R. Johnson and *Gill*, for the Appellant. It is admitted in this case that *Gilbert Falconer*, under whom the lessor of the plaintiff and the defendant claim, died seized of a tract of land called *Convenience*, as located on the plots, and a part of a tract of land called *The Resurvey on Wild Cat Hill*, as also located on the plots, the location of which lands conflict as exhibited by the plots, and before his death made the will contained in the record. It is admitted that *The Resurvey on Wild Cat Hill* is an elder tract than *Convenience*. The question is, whether the devisee of *Convenience* is entitled to that tract according to its original location? If he is, the judgment of the court below must be reversed. If the devisee of the part of *The Resurvey on Wild Cat Hill*, under a true construction of his devise, is entitled to claim to the outlines of *The Resurvey of Wild Cat Hill*, then the judgment of the court below is right.

To show that the devise to *Gilbert*, the son, passed the whole of the tract called *Convenience*, they cited *Huntt & Parks vs. Gist*, 2 *Harr. & Johns.* 505. *Hawkins vs. Hanson*, 1 *Harr. & M'Hen.* 523. *Buchanan's Lessee vs. Steuart*, 3 *Harr. & Johns.* 329. *Hammond vs. Ridgely's Lessee*, 5 *Harr. & Johns.* 245. Coke *Litt.* 112, b, (*note* 1.) and *Ridout vs. Pain*, 3 *Atk.* 493.

Taney, for the Appellee. *The Resurvey on Wild Cat Hill* is the eldest tract, and it is the last tract devised; and the last clause in a will revokes a devise of the same thing in a prior clause.

BUCHANAN, Ch. J. delivered the opinion of the Court. It is admitted by counsel, that *Gilbert Falconer*, under whom the appellant and appellee both claim, died seized of the tract of land called *Convenience*, and a part of the tract of land called *The Resurvey on Wild Cat Hill;* that the locations of the two tracts of land conflict; and that that portion of land lying within the outlines of *Convenience*, which the suit was brought to recover, is embraced by the outlines of that part of *The Resurvey on Wild Cat Hill*, of which *Gilbert Falconer* died seized. And the question is, whether his son and devisee *Gilbert Falconer*, took under the devise to him of *Convenience*, all the land lying within the outlines of that tract, or only so much as was not covered by *The Resurvey on Wild Cat Hill*, the elder tract?

The devise of *Convenience* being of that tract by name, and of course sufficient to pass all the lands included within its outlines, if there was nothing to control or restrict it to a smaller quantity, and the devise in relation to the part of *The Resurvey on Wild Cat Hill*, which was owned by *Gilbert Falconer*, the testator, being also by name, and the outlines of that part of *The Resurvey on Wild Cat Hill* embracing that portion of land included within the outlines of *Convenience*, for which the suit was brought, it would follow, that the same land was twice devised; *first* to *Gilbert Falconer*, under the devise to him of *Convenience;* and *secondly*, to be sold by the executor and executrix of the testator, for the payment of his debts, under the devise in relation to that part of *The Resurvey on Wild Cat Hill*, of which he died seized. And under a literal application of the old rule, that the last will shall prevail, neither *Gilbert Falconer*, the devisee of *Convenience*, nor the appellant, his grantee, would be entitled to any part of the land so devised to be sold for the payment of the debts of the testator.

But considering the appellant, and the defendant who was the purchaser of all the land devised to be sold for the payment of the testator's debts, as tenants in common of that portion of land affected by the two devises, the appellant could not recover in this action, the only count in the declaration being on a demise of an entirety. For, though under a demise of an entire tract of land less than the whole tract may be recovered, yet on the authority of *Carroll & others Lessee vs. Norwood's heirs*, 5 *Harr. & Johns.* 164, under a declaration on a demise of an entirety, an undivided part cannot be recovered.

But without resorting to this technical doctrine, it appears to us that the appellant is not entitled to recover, on a plain and fair construction of the will of *Gilbert Falconer.* In the deed to him from *Thomas Neill*, *Convenience* is described as containing "two hundred and nineteen acres more or less," and the part conveyed to him by the same deed, of *The Resurvey on Wild Cat Hill*, is described as containing "three hundred and nineteen acres more or less;" and in his will he describes the same lands in the same way, probably without knowing that any of the lines interfered with each other; and intending, as it would seem, to dispose of both as he got them, according to their correct locations, whatever they might respectively be, without any very particular regard to the quantity of land that either might contain; but manifesting, by the use of the words "more or less," in designating the quantity, the supposition that they might not contain the number of acres stated, and leaving those interested to take whatever they might respectively contain, according to their proper relative locations; without intending to direct that either of them should be held, according to the courses and distances expressed in the grant, but that both should pass, according to the legal operation and effect of the respective grants. And the grant of *Convenience*, being the junior grant, the location of that tract of land is controled by the true original location of *The Resurvey on Wild Cat Hill*, the elder tract, and by operation of law restricted to contain only so much land as lies clear of the lines of *The Resurvey on Wild Cat Hill*, and passed to the devisee *Gilbert Falconer*, subject to that restriction. For it cannot well be supposed, that if the testator had intended to give to the devisee of *Convenience* all the land embraced by the outlines of that tract, no matter how they might interfere with the lines of *The Resurvey on Wild Cat Hill*, that he would immediately after, in the same will, and in the very next clause, have made the unrestricted devise he did in relation to his part of the latter tract.

JUDGMENT AFFIRMED.

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Barger, *et ux*. Ex'x. of Athey, *vs*. Collins.—June, 1826.

In an action of *assumpsit* for work and labour done, and materials found, where the plaintiff gave in evidence a written settlement between plaintiff and defendant, acknowledging a balance due by defendant, it is competent for the defendant to show that the items in the settlement are partnership claims due plaintiff and another.

An account stated is not conclusive on the parties to it, but may by either party be modified by other evidence.

Where a debt is due a partnership which is afterwards dissolved, and the debt is assigned to one of the partners, it is competent for such partner to sustain an action for it in his own name, by proving that the debtor, with a knowledge of such assignment, promised to pay it to him; and such a promise may be implied from the acts of the debtor, as well as expressly proved.

The mere filing an account in bar is no evidence of the truth of the account.

If the plaintiff shows himself entitled to recover any sum, which with interest amounts to a sum within the jurisdiction of the court, it is error for the inferior court to direct the jury generally that he is not entitled to recover.

Appeal from *Baltimore* County Court. *Assumpsit*. 1. For work and labour, and materials found. 2. *Quantum meruit* for work and labour, and for materials found, &c. 3. For money laid out and expended, lent and advanced. And 4. An *insimul computassent*, &c. The defendant, (now appellee,) pleaded *non assumpsit*, and issue was joined. The defendant also gave notice of a *set off* for money lent and advanced to, and paid, laid out and expended for, the plaintiffs' testator in his lifetime, &c. At the trial the plaintiffs, (the appellants,) offered in evidence the following paper, to show that the defendant was indebted in the amount therein mentioned: "Settlement of accounts this 1st day of March 1820, with *Walter F. Athey*, for bricks and brick work, and I do hereby acknowledge the following balance to be correct.

Balance on Mr. *Higginbothom's* house, *Franklin-street*,	$10 00
Balance on six buildings, *North Charles-street*,	964 01
On my account,	39 61
	$1013 62

Balance of one thousand thirteen dollars and sixty-two cents. *Jas. W. Collins.*"

The defendant then offered evidence of his having paid for the use of *Walter F. Athey* the following sums, viz. $20, $30 and $145, by filing his account in bar. And further offered evidence to show, that *Deter Barger* and the said *Walter F. Athey*, were copartners in the bricklaying business, and did the work as bricklayers on the six buildings in *Charles-street*; and that *Athey*, and a certain *George Shoemaker*, were copartners as brick makers, and furnished the bricks to the defendant for the said six buildings mentioned in the memorandum offered in evidence by the plaintiffs, and that the work was done by *Athey* and *Barger*, and the bricks furnished by the said *Athey* and *Shoemaker*, in the year 1818, or 1819; and produced the following accounts, which were in the possession of the defendant, and are in the handwriting of *Athey*, viz.

"Mr. *James W. Collins*, and others, for six houses in *North Charles-street* to *Geo. Shoemaker & Co.*

1819, April 21.	To 1500 paving brick at $11 per th.	$16 50
	To 6500 front brick at $15 per th.	97 50
August 16.	To 59,000 common brick at $8 per th.	472 00
	To 17,935 paving brick at $9 50 per th.	170 38
		$756 38

To *W. F. Athey & D. Barger.*

To laying 6400 bricks at $3 50 per m.	$224 00
Aug. 16. To paving 505 yards back and front at 50 cents per yd.	75 75
To" &c. &c.	13 00
	$312 75

"Cr.	By cash	128 50	
	By," &c. &c.	14 33½	142 83½
			$169 92½
"To 4 bushels lime, &c.			1 60
			$171 52½

Mr. *James W. Collins*, and others, for six houses in *North Charles-st.* to *Geo. Shoemaker, & Co.*

1818, Sept.	To 348,500 bricks at $8 per th.	$2788 00
	To" &c. &c.	513 20
		3301 20
	"Cr. By" &c. &c.	2535 20
		$766 00

"To *W. F. Athey & D. Barger.*

To laying 379,000 bricks at $3 50 per th.		1326 50
To "&c. &c.		108 75
		1435 25
"Cr. By" &c.		3 00
		1432 25
		766 00
	"Balance	$2198 25
Turner Morehead's bill, &c.		275 75
		$1922 50"

To the production of this evidence, so offered by the defendant, the plaintiffs objected; but the court overruled the objection, and permitted the evidence to go to the jury. The plaintiffs then offered to prove, that the partnership which had existed between *Athey* and *Shoemaker* was dissolved in November or December 1819, and that *Shoemaker* then assigned, for a valuable consideration, all his interest in said concern, and all debts due said copartnership, to *Athey*. And also offered to prove, by the production of the memorandum first above written, that at the time the defendant signed the said paper, he had notice of such dissolution and assignment. Which evidence the court, on motion of the defendant, refused to permit the plaintiff to offer to the jury. The defendant then moved the court to direct the jury, that the plaintiffs were not entitled to recover. Which direction the Court, [*Hanson*, A. J.] accordingly gave. To these opinions and directions the plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Martin, Stephen, Archer, and Dorsey, J.

S. J. Donaldson, for the Appellants, contended, 1. The appellee is liable in this action to the appellants, although at the time of contracting the debt he was acting as agent for others.

2. The appellants are entitled to recover, although the debt was originally due to the appellants' testator, and his copartners.

3. The written acknowledgment of the appellee, offered in evidence, is sufficient proof of his having notice of the dissolution of the copartnerships, and of the appellants' testator having the entire interest in the debt claimed in this action, vested in him.

4. The evidence of the defendant in the court below, which was objected to by the plaintiffs, was not proper and legal evidence; and that of the plaintiffs, which the court refused to permit to go to the jury, was legal and proper.

On the *first point*, he cited *Owen vs. Gooch*, 2 *Esp. Rep.* 567. *Hanson vs. Roberdeau*, *Peake's N. P. Cases*, 120. *Hardacre vs. Stewart*, 5 *Esp. Rep.* 103; and *Thomas vs. Bishop*, 2 *Stra.* 955.

On the *second* and *third points*—*Welch vs. Mandeville*, 1 *Wheat.* 235. *Andrew vs. Bleeker*, 1 *Johns. Cas.* 411. *Warden vs. Eden*, 2 *Johns. Cas.* 121, 258. *Littlefield vs. Story*, 3 *Johns. Rep.* 425. *Master vs. Miller*, 4 *T. R.* 340, per *Buller*, J. *Morrough vs. Comyns*, 1 *Wils.* 211. *Fenner vs. Meares*, 2 *W. Blk. Rep.* 1269. *Innes vs. Dunlop*, 8 *T. R.* 595. *Banfill vs. Leigh & Jeffray*, *Ib.* 571. *Scott vs. Lancaster*, 3 *Harr. & Johns.* 441. *Allstan's Adm'r. vs. Contee's Ex'r.* 4 *Harr. & Johns.* 351. *Oble vs. Dittlesfield*, 1 *Vent.* 153. *Suretees vs. Hubbard* 4 *Esp. Rep.* 203. *Howell vs. Mac Ivers*, 4 *T. R.* 690. *Onion vs. Paul*, 1 *Harr. &*

Johns. 114. *Peake's Evid. (Norris's Ed.)* 394, cites *Moore et al. vs. Hillin* (*MS.*) 1 *Com. on Cont.* 327. *Holmes vs. D'Camp,* 1 *Johns. Rep.* 34. *Israel vs. Douglas,* 1 *H. Blk. Rep.* 239.

On the *fourth point,* he cited *Peacock vs. Harris,* 10 *East,* 104.

Williams, (District Attorney of *U. S.*) for the Appellee. Can one partner bring an action in his own name where there is another partner alive? There was no evidence offered of a dissolution of the partnership between *Athey* and *Barger,* nor was any assignment by the latter to the former proved, or offered to be proved. The evidence then was properly rejected by the court. The two points as to the admissibility of evidence, are involved in the other two questions in the case, for it is with reference to the object for which the evidence was offered that its admissibility comes in question. Even if the judge below did err in the generality of his expressions, yet it is no cause for *reversal,* when the final results must be the same. *Brazier vs. Clap,* 5 *Mass. Rep.* 10. 1 *Starkie's Evid.* 438. *Law vs. King,* 1 *Saund.* 80, *(note* 1.*)* and *Cooke vs. Sayer,* 2 *Burr.* 749.

1. The appellants were not entitled to recover, because the appellee was only an *agent* for six buildings on *Charles-street,* and was known by the other parties to be such. 2 *Livermore,* 245. *Owen vs. Gooch,* 2 *Esp. Rep.* 567. *M'Donough vs. Templeman,* 1 *Harr. & Johns.* 156. *Mauri vs. Heffernan,* 13 *Johns. Rep.* 56. *Pothier on Oblig.* No. 448, 449. Even if the vendor does not at the time know who the purchaser is, if he afterwards knows it, he may then *elect* to charge the principal, which lets off the agent. *Arch. Dig.* 67. 3 *Starkie's Evid.* 1620.

2. All *joint* contractors must be united. Here *Athey* had a partner in furnishing the bricks, who was *Shoemaker;* and a partner in laying the bricks, who was *Barger;* of course he cannot bring suit in his name alone—all must join. 1 *Chitty's Plead.* 6, 7. 1 *Saund.* 153, 291. 2 *Wheaton's Selw.* 186. *Arch. Dig.* 55, 58. *Lloyd vs. Archbowle,* 2 *Taunt.* 324. *Teed vs. Elworthy,* 14 *East,* 210. *Guidon vs. Robson,* 2 *Campb.*

302. *Scott vs. Godwin*, 1 *Bos. & Pull.* 67. *Dob vs. Halsey*, 16 *Johns. Rep.* 34. *Leveck vs. Shaftoe*, 2 *Esp. Rep.* 468. But if one of the partners is dead, then the survivor may bring the suit in his name, without naming his partner. *Ditchburn vs. Spracklin*, 5 *Esp. Rep* 31. *Holmes vs. D'Camp*, 1 *Johns. Rep.* 34. 3 *Starkie's Evid.* 1069. A promise to one partner to pay a partnership debt, must be understood to be a promise to him *as partner, and for the partnership;* otherwise it would be a *nudum pactum*, no consideration having passed from the promissee in his individual character. With respect to a surviving partner, it is different. But the statement of the account does not purport any thing like what is pretended, either as to the appellee's promise to pay as *principal*, or to his knowledge of the dissolution of the partnerships and assignments, &c. 1. There is no evidence of the assignments, especially of *Barger's* account. 2. There cannot be a legal assignment of *choses in action.* 3. And most conclusively so as to joint partners.

Moale, in reply, insisted that making the promise to *Athey* was presumptive evidence that the other persons, *Barger* and *Shoemaker*, were paid their proportions. *Bunn vs. Morris*, 3 *Caine's Rep.* 54. Here the defendant, with the consent of the other persons, has consented to make himself a debtor to *Athey*.

Dorsey, J. delivered the opinion of the Court. The plaintiffs having produced in evidence the written settlement, made between *Walter F. Athey* and *James W. Collins*, this court think it was competent for the defendant to show, that the items in the settlement were partnership claims due by *Collins* to *Athey* and *Barger*, and to *Shoemaker* and *Athey*, and that the testimony offered by the defendant is admissible for that purpose. An account stated is not conclusive upon the parties who made it, but may, by either of them, be contradicted, modified or explained, by other testimony than is afforded by the settlement itself. The defendant is at liberty to prove, that although upon its face it purports to contain debts due to *Athey* alone, yet that in truth and in fact, it was intended as a liquidation of the partnership claims of *Athey* and

Barger, and *Shoemaker* and *Athey*, made by one partner, as the agent and for the benefit of all; and in a suit, in the name of the firm, the settlement, with such explanatory proof, might be given in evidence, to support an *insimul computassent*. It hence follows, that the testimony offered by the defendant was competent, as showing that this action could not be supported for the want of proper parties plaintiffs. The court below were therefore right in overruling the plaintiffs' objection. But we think they erred in refusing to permit the plaintiffs' testimony to go to the jury for the purpose for which it was offered. There is some difficulty in conjecturing upon what ground their refusal was made. It cannot be denied that the facts offered in proof by the plaintiffs, raise some presumption of the existence of that which they wished the jury to find from them. If so, the jury, and not the court, are the judges of the weight and credit of the evidence offered, and the inferences of fact fairly deducible from it. The materiality of the testimony surely must be admitted, should the jury find from it that knowledge in the defendant, which it is offered to prove. A foundation would thereby have been laid by the plaintiffs, if they could have done so, to prove an express promise to pay by the defendant. If such proof were offered,—that the plaintiffs could recover in this action the amount of the debt due from the defendant to *Shoemaker* and *Athey*, it is unnecessary to show by reference to authorities. But we do not think that it would be incumbent on the plaintiffs to prove an express promise to pay. If the defendant, knowing of the dissolution of the partnership of *Shoemaker* and *Athey*, and the assignment of the partnership claims to *Athey*, accounted with him, as proved by the settlement exhibited on the trial, *Athey* might have sued in his own name, in the same manner, as if there had been an express promise to pay; and under the *insimul computassent* might have recovered whatever amount he could have shown was allowed him in the settlement, as a debt due to *Shoemaker* and *Athey*. That an express promise to pay is not absolutely necessary to entitle the assignee of a chose in action to a suit in his own name—Vide *Surtees vs. Hubbard*, 4 *Esp. Rep.* 203. *Moore & another vs. Hill, Norris's Peake*, 394; and *Peacock vs. Harris*, 10 *East*, 104.

We think the county court erred also in their opinion on the defendant's prayer that the plaintiffs were not entitled to recover. The only item in the settlement, the recovery of which the defendant attempted to resist on the ground of its being a partnership claim, was the "balance due on six buildings, *North Charles-street.*" As a bar to the recovery of the other two items of $10, and $39 61, the defendant has offered no testimony. These sums, with the interest thereon, which the jury were authorised to allow, would have sustained the jurisdiction of the court, and might have been recovered in this action. It is true the bill of exceptions states that "the defendant offered evidence of his having paid, for the use of *Walter F. Athey*, the following sums of money, viz. $20, $30, and $145, by filing his account in bar." But surely the mere filing of an account in bar is not such proof of the charges it contains as would warrant the court in withdrawing the finding of the facts from the jury, and recognizing the set-off as a bar to the plaintiffs' right to recover. Nay, the mere circumstance of the court's submitting it to the jury, to say whether the account in bar should be allowed as a set-off to the plaintiffs' claim, in the absence of all proof to support it, would be error, for which their judgment would be reversed.

We concur with the county court in their *first* opinion, and dissent from their *second* and *third* opinions, as stated in the bill of exceptions, and therefore reverse their judgment, and award a *procedendo*.

JUDGMENT REVERSED, &C.

DALLAM *vs.* DALLAM'S Lessee.—June, 1826.

M, by will devised to "R & J, and to their heirs and assigns, forever, as tenants in common, equally to be divided between them, all that tract of land called *P. F*; but if either of them dies before *the age of* 21 *years, and without issue*, then I will that one equal half part of the said land be held and enjoyed by G, his heirs and assigns, forever; and in case the said R & J should *both die before the age of* 21 *years as aforesaid, and without issue*, then I give and devise the whole of *P. F.* to the aforesaid G, his heirs and assigns, forever."—*Held*, That R & J took, under this devise, an estate in fee in the land devised, defeasible upon their dying before the age of 21, and without issue, and to become absolute either on their reaching that age, or dying under that age, leaving issue.

A limitation over on a dying *without issue generally*, when applied to real estate, means an indefinite failure of issue; though it is otherwise in bequests of personal property.

In order to effectuate the intention of the testator, the word *or*, will be construed *and*, or *and, or*.

APPEAL from *Harford* County Court. Ejectment for a tract of land called *Palmer's Forest*. Plea, not guilty, and issue. A verdict was taken for the plaintiff, subject to the opinion of the court on a case stated, (which is set out in the opinion delivered by this court,) and which raised the question as to what estate *Josias Dallam* took under this devise in the will of *Frances Middlemore*, dated the 11th of August 1755.—"I give and devise unto the aforesaid *Richard Dallam* and *Josias Dallam*, and to their heirs and assigns forever, as tenants in common, equally to be divided between them, all that tract of land called *Palmer's Forest*, lying on the west side of *Swan creek; but if either of them dies before the age of twenty-one years, and without issue*, then I will that one equal half part of the said land be held and enjoyed by *Gouldsmith Garretson*, (son of *George* and *Martha Garretson*,) his heirs and assigns, forever, to whom I give and devise the same accordingly. And in case the said *Richard Dallam* and *Josias Dallam* should both die *before the age of twenty-one years as aforesaid, and without issue*, then I give and devise the whole of *Palmer's Forest* to the aforesaid *Gouldsmith Garretson*, his heirs and assigns, forever." The County Court, [*Ward*, A. J.] was of opinion, that *Josias Dallam* took only an estate tail under this devise, and gave judgment for the plaintiff. From that judgment the defendant appealed to this court.

The cause was argued at the last June term before BUCHANAN, Ch. J. and EARLE, STEPHEN, and DORSEY, J.

R. Johnson, for the Appellant, contended, that by the true construction of the devise in question, *Josias Dallam* took a fee simple interest, descendible, on his death in 1820, to his children equally. He cited *Barnitz's Lessee vs. Casey*, 7 *Cranch*, 456, 468, 469. *Brogden vs. Walker's Ex'r. &c.* 2 *Harr. & Johns.* 285. *Todd et ux. vs. Pratt*, 1 *Harr. & Johns.*

465. *Hauer vs. Sheetz*, 2 *Binney*, 532. *Barker vs. Suretees*, 2 *Stra.* 1175. *Frammingham vs. Brand*, 1 *Wils.* 140; and *Thrustout vs. Denny*, *Ib.* 270.

Mitchell, for the Appellee. The parties in this case are two sons of *Josias Dallam*—*William M. Dallam*, the eldest, and heir in tail, if *Josias Dallam* took an estate tail under Mrs. *Middlemore's* will. There are *five* classes of gifts in the will to *Josias Dallam*, who appears to be the *first* object of bounty of the testatrix, and after his death, his issue, and after his issue spent, then *Gouldsmith Garretson* in preference to the collateral heirs at law. All the devisees and legatees, from the face of the will, are evidently nephews and nieces of the testatrix. Who her heir at law was does not appear.

1. This is a good *remainder*, created at the same time with the particular estate tail, and by the same instrument. The remainder-man was *in esse*, in whom it could vest, and to take effect *eo instanti* the particular estate, determined by failure of issue of the first devisee in tail. No fee was limited on a fee; for the first limitation was reduced to an estate tail by use of the subsequent word *issue*. Where a devise over *can* be upheld as a *remainder*, it shall never be construed an *executory devise*. 2 *Fearne*, 210, 211, 2, 3, 4. 3 *Com. Dig.* tit. *Devise*, (N. 15, 16, 17,) 448, 450. *Tenny vs. Agar*, 12 *East*, 263, 264. *Purefoy vs. Rogers*, 2 *Saund.* 388. *Plunkett vs. Holmes*, Sir *T. Raym.* 29. *Doe vs. Morgan*, 3 *T. R.* 763. Remainders tend less to perpetuity than executory devises, and in this country emphatically ought to be preferred, as those may be barred by fine, &c. but executory devises cannot. The legislature of this state, by abolishing estates tail, did not intend to favour executory devises, which tend to perpetuities more strongly. It is said in *Fortescue*, that executory devises began soon after the stat. 29 *Hen. VII.* In *Strange*, 130, that they began in the time of *Elizabeth*. In *Porter vs. Bradley*, 3 *T. R* 146, by Lord *Kenyon*, that they began in the time of *Charles I;* yet Lord *Kenyon* in that case calls *Pells vs. Brown*, which was decided in the time of *James I*, the *magna charta* of this branch of the law.

2. The intent of the testator is the pole-star to guide courts in the construction of a will. That in favour of the *first devisee* is subordinate to the *general* intent, and must yield if inconsistent with it. Such *intent* must be subservient to the rules of law; and if technical words are used which have been long settled as rules of real property, they must receive a technical construction. The rule is that the use of the word *issue*, in reference to a devise by word *heirs*, restrains the broad import of the word *heirs* to the particular heirs included within the word *issue*. Thus a devise to A, and his heirs and assigns forever, but if he die without issue, then over to B in fee, is always construed an estate tail in A, as the real intent of the devisor. And this whether such a devise be to a *stranger*, or to a relation of the first devisee, or the testator. *Secus*, if devise over be upon the devisee's death without *heirs*. In that case there is a distinction between a devise over to a relation or to a *stranger*. Hence it is an universal rule, subject to no exception—wherever an estate is devised for life or in fee, and an estate over is limited after dying without issue, or without heirs of the body, &c. of the first taker, the first devise is modified and explained by the subsequent words, and is either enlarged in the first instance, or restrained in the latter, to an *estate tail*. *Porter vs. Bradley*, 3 *T. R.* 143. 3 *Com. Dig.* 428. 6 *Cruise's Dig.* 269, 270, and cases there cited. *Price vs. Huntt*, *Pollexf.* 645. *Clache's* case, *Dyer*, 330, b. *Doe vs. Rivers*, 7 *T. R.* 272. *Forth vs. Chapman*, 1 *P. Wms.* 663. *Hawley vs. Northampton*, 8 *Mass. Rep.* 43. The validity of the devise over has no influence upon the construction of the words limiting the *quantity of estate* given to the first taker. The first words are modified and explained by the restrictive words in the subsequent clause, notwithstanding the devise over may be void. As a limitation over upon an indefinite failure of issue is void as an executory devise, yet it may be good as a remainder upon the estate tail by implication. 2 *Fearne*, 182. *Brown vs. Jervas*, *Cro. Jac.* 290. 6 *Cruise*, 270, *s.* 8.

3. Other conditions, annexed to the dying *without issue*, do not restrain the legal import of these words as to the quantity of estate of the first taker: but the word *issue* is still explana-

tory and restrictive of the word *heirs*, as to the line of heirs intended, and will modify the first devise in fee, and reduce it to one in tail, although this contingency may have *any other* added to it to limit and control the *period* when the devise over is to take effect, or to be defeated. Thus, if he die without issue *and unmarried*, after a devise in fee—Held to reduce the fee to an estate tail; as in *Jackson vs. Billinger*, 18 *Johns. Rep.* 369. So to A, and his heirs, and if he die without issue, *after paying* £100 *to B*—Held, an estate tail in A. *Wilson vs. Dyson*, Sir *T. Raym.* 425. 3 *Com. Dig.* 428. So, if he die without issue, *living B. Clache's* case, *Dyer*, 331. a. So *if he die without issue and under* 21. *Soulle vs. Gerrard*, *Cro. Eliz.* 525. *Hilliard vs. Jennings*, *Cro. Jac.* 415. Even in *personalty. Roosevelt vs. Thurman*, 1 *Johns. Cha. Rep.* 227, 228. *Cruger vs. Heyward*, 2 *Desauss.* 112. So *White Acre* to A, and *Black Acre* to B, and their heirs, forever; but if either die under 21, and without issue, the survivor to be heir to the other—Held estates tail. *Chadock vs. Cowley*, *Cro. Jac.* 695. *Pollexf.* 487. 6 *Cruise*, 270. *Collinson vs. Wright*, 1 *Siderf.* 148. 4 *Bac. Ab.* 251, 294. 2 *Fearne*, 390. So, if he die without issue in the lifetime of his sister B. In every case of an executory devise there are two distinct questions, 1. What quantity of estate the first taker takes under the will; and this depends on the import of the technical words used. 2. What is the period limited by the will for the vesting of the executory devise. This is a mere question of *policy*, having no bearing on the technical terms.

4. The will must in all cases be construed according to its *prospective* import, and with reference to all *possible* contingencies *in futuro.* It must speak from the CREATION of the *estate*, and is never to be modified or varied in its construction by subsequent events and accidents. *Goodman vs. Goodright*, 2 *Burr.* 878, per Ld. *Mansfield.* 6 *Cruise Dig.* 449. 2 *Fearne*, 159, 160. 3 *Com. Dig.* tit. *Devise*, 450. Though this rule is acknowledged by all judges, yet they do in fact construe the will from the subsequent event, by holding the devisee tenant in fee simple absolute *when he attains* 21, if the first limitation is to him in fee, with a devise over on his dying under 21, and without issue. Such was the case in *Barnitz Les-*

see vs. Casey, 7 *Cranch*, 426. Such was the case of *Hauer vs. Sheetz*, 2 *Binney's Rep.* 532; though the decision in the latter case was upon the *charge* laid on the devisee. So the *English* cases in the time of Ld. *Hardwicke*, and several cases since. All of these cases were adjudged upon *subsequent events*, after the *creation* of the estate.

5. Where the devise over is made to depend upon two or more contingencies, whether these are connected by the copulative *(and,)* or disjoined by the disjunctive *(or,) all* the contingencies must happen—*all* must concur to give effect to the devise over. If either fails to happen, the devise over is defeated. Thus in this case, if the first devisee attains full age, the limitation over is defeated, although he should die without issue. So if he leave issue, though he should die under 21, it is sufficient to defeat the contingency over, and the first devisee leaves an absolute estate tail to his issue, which fails only on general failure of issue, and then the estate reverts to the heir at law of the devisor. *Wright vs. Kemp*, 3 *T. R.* 472. *Fairfield vs. Morgan*, 5 *Bos. & Pull.* 38. *Doe vs. Jessep*, 12 *East*, 288. *Hauer vs. Sheetz*, 2 *Binney's Rep.* 544, per *Tilghman*, Ch. J. And the courts will construe the particles *or* and *and*, one for the other alternately, so as to carry this rule into effect in favour of the issue of the first devisee, and to prevent his disinherison by a literal interpretation of the devise. *Fairfield vs. Morgan*, 5 *Bos. & Pull.* 38. If *both* must *concur*, and *one* of these is *too remote*, or *can possibly* in any future state of things be too remote, the limitation over cannot take effect as an executory devise; and in such case it must either fall altogether, or must be construed a *remainder*, if the *particular* preceding estate be sufficient to support it as a *remainder*. For the only contingencies upon which a good executory devise can be limited, are such as *must necessarily* happen within the prescribed period, and which cannot *possibly* happen after a life or lives in being, and 21 years and a fraction of a year. Now if *one* of these contingencies be the death of the *first devisee without issue*, and such devisee should *leave issue* upon his death under 21, the failure of that issue is a condition precedent to the estate of the executory devisee; and as such issue may not fail until after the prescrib-

ed period, or may possibly endure until the prescribed period is past, the devise over is not a good executory devise, but must take effect as a remainder, or not at all. The cases then that oppugn this construction are, either, 1. Those cases where the contest was between the executory devisee, and the heir of the first devisee, which do not apply to this case, where the contest is between the eldest and younger son of the first devisee, and depends on the quantity of the estate taken by the first taker, and no question arises as to the validity of the devise over. 2. Those cases arising on marriage articles, and family settlements, where the issue are considered as purchasers, and the words used are those of both parties. 3. Those cases where subsequent limitations were to *survivor*, or other relation of devisor or devisee, and where such limitations were considered as restrictive of the general import of the phrase "dying without issue." 4. Cases relating to *personal* property, where words have been considered as restrictive of the limitation over within the prescribed period, which would not be so construed in reference to real estate. 5. Cases of trusts which though partially too remote, equity will execute by the rule of *cy pres* as near to the apparent intent as the rules of law will admit. Or, 6. Cases where the devises have been construed from the event, and not from the death of the devisor, when the estate was created.

All these cases are to be laid out of view as inapplicable to the present cause.

In the case of *Long vs. Blackall* in 1797, 7 *T. R.* 98, Lord *Kenyon* lays down the true rule as to executory devises. "It is an established rule," says he, "that an executory devise is good *if it must necessarily* happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for time of gestation." So in *Goodtitle vs. Wood*, in 1740, in C. B. 7 *T. R.* 99, *note* (a,) Lord Chief Justice *Willes* had recognized the same rule, and says, executory devises to be good must be so limited, that "the contingency *must* happen within the compass of a life or lives in being, or a reasonable number of years. So extended to a child in *ventre sa mere*, as that contingency *must necessarily happen* within less than nine months after the death of a person in being." So

Mr. *Hargrave*, in his Law Tracts, 1 vol. 518, says, "every contingency, which is not such that if it ever happens it *must necessarily* happen within the period prescribed, is too remote for an executory devise." Yet Lord *Kenyon*, in *Roe vs. Jeffrey*, in 1798, 7 *T. R.* 591, says, "nothing can be clearer in point of law, than that if an estate be given to A in fee, and by way of executory devise an estate be given over which *may* take place within a life or lives in being, and twenty-one years and a fraction of a year afterwards, the latter is *good* by way of executory devise!" Hence the spurious construction that has sprung up in modern cases, that the devisee, where the limitation was first in fee, and then over upon his *dying without issue and under twenty-one*, took a *fee simple* on his attaining full age, otherwise not; a construction not arising from the words of the will, but from *the event*—from *subsequent accidents*, by substituting *may* for *must*. It is said that such a limitation over is good, because the contingency *may* happen by his death under age, which is not too remote. But the *true rule* is, that it *must necessarily happen* within the prescribed period. Now it is clear, that if the first devisee should happen to die *under twenty-one*, having first married and had *issue*, the contingency has *not* happened at his death, as to his *dying without issue*, unless these precise words are to receive a new and unauthorised interpretation in this case from that which they have received both in courts of law and equity for more than four centuries; which is, that *he only dies without issue*, when the *whole line of descendants* is *spent*. In this hypothetical case, therefore, the first devise is an absolute estate in the first devisee, *descendible to his issue, although he dies under twenty-one;* and this is nothing more than an *estate tail*. It is construed an estate tail, either, 1st. Because the limitation over is upon an indefinite failure of issue alone and unrestricted, where issue is left by a devisee dying under age, and so too remote to be a good executory devise, and so *must* be construed an *estate tail* to give the remainderman any benefit from the limitation over. Or, 2dly. If the indefinite import of these words is to be considered as restrained by the additional contingency of his *dying under age*, and so *may* take effect as an executory devise. Still it may take effect also as a *remainder*, in case of his death under age, vesting in possession only *on failure of the descendants* of the child born during the devisee's minority. And then the rule above stated applies, that courts *must* construe it a *remainder.* The rule being imperative that *judges* shall wield the power of the context in aid of constructive remainders, and against executory devises. Yet courts, in modern times, though they dare not deny this rule, do in effect lean against it in their construction, and in favour of executory devises, and have so done, with few exceptions, since the case of *Pells vs. Brown, Cro. Jac.* 592. In that case the restriction was applied by the devisor to the words, "dying without issue, *living W.*" fixing the period when the issue was to fail. Whereas in *this* case the *dying under twenty-one, and without issue,* has no words of restriction *as to the failure of issue;* for if *issue is born,* even after the death of the first devisee under twenty-one, (he having left his wife *ensient,*) that issue shall take to the exclusion of the devisee over. How long shall the devisee over be postponed in this case? It may be answered, until the failure of this line of descendants, and *no longer;* which gives effect to the general intent of the testator to provide for the devisee over as the *next* favourite to the first devisee. But it is said by the counsel opposed to me, that he shall be postponed *forever,* and he will construe it an executory devise, in order to defeat the limitation over, and the general intent; and in order to support it as an *executory devise,* he construes the first devise as an *estate in fee simple,* though the very same words in other cases are construed as an *estate tail*—the general words being restrained by the subsequent word *issue.* It follows, that by our construction, effect is given to the *remainder over;* by the opposite construction the remainder over is defeated in favour of collateral relations of the first devisee, who never entered into the view of the devisor. So in devises of chattel interests, if between the term of the ancestor, and the estate of his heirs, there is no vested freehold remainder, the heirs can only take by way of *executory devise,* which *ex vi termini* implies an estate *not executed* in the ancestor." *Perrin vs. Blake,* per Sir *W. Blackstone,* J. *Hard. L. T.* 505. Here is a freehold estate vested in the first devisee, and executed in him, and a remainder "passing out of the devisor at the same instant to the devisee over who is *in esse*. The case of *Collinson vs. Wright*, 1 *Siderf.* 148, cited in 2 *Fearne*, 390, and in 4 *Bac. Ab.* 251, 294, decided in 1663, is strong in support of our construction. There the devise was to A, the testator's son and heir, and if he died before his age of 21 years, and without issue of his body *then living*, then remainder over. It was held he took a fee, because the estate tail was limited to *commence* upon a *subsequent contingency*. Here the failure of issue was not too remote, as it was to happen upon his leaving none *living at his death;* but the words "if he die under 21," were not *per se* sufficient to restrict the words "without issue," within the definite period prescribed by law. The first case upon this subject arose immediately after the birth of executory devises, and the true distinction was there settled by three judges of the King's bench against one *Clache's* case, 3 *Dyer*, 331, (15 *Eliz.* 1573.) Devise to daughter A, and her heirs forever, and another devise to daughter B, and her heirs forever; and if A should *die having no issue, living B*, then her share to B in fee. If B die under 16 and living A, then B's share to go to A in fee. If *both* die having no issue, the whole to C and D, &c. This was held by three justices to be an *estate tail* in the daughters—*Dyer* dissenting. "The opinion of the three judges in this case," says Mr. *Cruise*, (6 *Cruise's Dig.* 270,) "has been confirmed by several subsequent determinations." In *Collinson vs. Wright*, decided about a century afterwards, the decision rested upon *Clache's* case as good authority. 1 *Siderf.* 148, (15 *Car. II.* 1663.) 4 *Bac. Ab.* 251, 294. 2 *Fearne*, 390. Devise to one of four sons, and *his heirs forever*, and if he die within age, or without issue, to his three other sons, equally to be divided. The devisee had a daughter, and died within age—Held by the court unanimously, he took an estate tail that descended to his daughter. *Soulle vs. Gerrard, Cro. Eliz.* 525, (37 *Eliz.* 1595.) S. C. *Noy*, 64. S. C. *Moor*, 422. This case is of *very high authority*, and *fully in point* for the construction we contend for. It is cited by Lord *Holt*, near a century afterwards, as settling this devise to be an estate tail in *Hilliard vs. Jennings*, 1 *Ld. Raym.* 505, and in *Price vs. Hunt*, 1 *Pollexfen*, 645; by

Justice *Buller*, as good authority, in *Wright vs. Kemp*, 3 *T. R.* 474; by *Le Blanc*, J. in *Denn vs. Remeys*, 9 *East*, 376, and by *Cruise*, in 6 *Cruise's Dig.* 270. Devise to son *John*, and his heirs, and if he die without issue, devise over to nephew in fee—Held an estate tail in *John*, and no fee. *Brown vs. Jervas*, *Cro. Car.* 290, (8 *Jac.* I.) Devise over after a fee, upon the contingency of default of *heirs* of devisee in life of collateral heirs. Held an estate tail if devisee over a collateral heir of devisor or devisee. Showing an intent to confine the limitation to *lineal heirs*. *Webb vs. Herring*, *Cro. Jac.* 415, (13 *Jac. I.*) So *Tyte vs. Wyllis*, *Ca. temp. Talb.* 1. *Nottingham vs. Jennings*, *Dig. Ch. Rep.* 35. *Com. Rep.* 81. 3 *Com. Dig.* tit. *Devise*, (N. 5,) 428, 430. So *Morgan vs. Griffiths*, *Cowp.* 234. In *Dutton vs. Engram*, *Cro. Jac.* 427, (15 *Jac. I*,) the devise was to wife for life, then to *John* and *his heirs*, on condition he should pay an annual rent thereout; and if *John* die without heirs of his body, the land should remain to *Stephen*, and the heirs of his body—Held, that *John* took an estate tail. Devise to A, and his heirs, and the other land to B, and his heirs, and if B dies without issue, living A, to A, and if *both* die without issue then to D, is an estate tail in A. 1 *Roll. Ab.* 839, l. 25. 3 *Com. Dig.* tit. *Devise*, (N. 5,) 428. *King vs. Rumball*, *Cro. Jac.* 448. 1 *Fearne*, 369. 6 *Cruise's Dig.* 284. Devise to three daughters in fee, one to be the others heir—an estate tail. In *Chadock vs. Cowley*, *Cro. Jac.* 695, (22 *Jac. I.*) *Pollexf.* 487. 4 *Bac. Ab.* 257, 258. 6 *Cruise Dig.* 270, the testator devised his lands in *B* to *Thomas* his son, and his heirs forever, and his lands in *E* and *L* to his son *Francis*, and his heirs forever. The survivor of them to be heir to the other, if either die without issue, (i. e. if *Thomas* die without issue, living *Francis*, or *Francis* die without issue, living *Thomas*—then over in fee.) Held an *estate tail* in each son, and not a fee; and this too immediately after *Pells vs. Brown*, which held this to be a *fee*. *Cro. Jac.* 590. And it was said by the judges in *Chadock vs. Cowley*, if it had been a devise in fee, and *"if he died without issue before such an age,"* then it would have been a *contingent devise in tail*, if it had happened, but not otherwise—But here an absolute estate tail. In *Collinson vs. Wright*, the case of *Chadock vs. Cowley* was relied on by the court, and approved as good authority long afterwards. So devise to son C an annuity, "and if my son C shall die before any issue of his body, so that my land descend to D before he attains 21, then my executors to occupy till D is 21,"—gives an estate tail to C by implication. *Newton vs. Bermandine, Moor*, 127. 6 *Cruise's Dig*. 282. Here is a double contingency—dying without issue, and also before D attains 21 years of age. In *Hilliard vs. Jennings*, 1 *Ld. Raym*. 505, (11 *Wm*. III.) 1 *P. Wms*. 557. *Carth*. 514—the devise was to A, and his heirs forever, and if he die without issue of his body, or before 21, then to B. The first devisee attained 21, and died without issue, devising away the land by a will with two witnesses only. Lord *Holt* appears to have considered this a clear estate tail in A; though the case went off upon the statute of frauds. Devise to daughter A all the testator's real and personal estate, to hold to her and her children, or issue forever; and *if she should die leaving no child*, or, *if her children should die without issue*—Held an estate tail in A. *Wood vs. Baron*, 1 *East*, 259. 6 *Cruise's Dig*. 281. Devise to A, and the heirs of his body, and if he die under 21, and without issue, to B—Held an estate tail in A. *Roe vs. Scott & Smart*, 2 *Fearne*, 204, (27 *Geo*. III.) So that a limitation over is a good remainder. notwithstanding the contingency annexed of dying under 21—Showing that this does not restrain the indefinite failure of issue. If A die without heirs before 21, so that the estate falls to his sister, is an estate tail in A. 3 *Com. Dig*. 429. 2 *Levintz*, 162. If A die before he has issue, *during the minority of B*, was held an estate tail in A, though a double contingency. *Moor*, 127. 3 *Com. Dig*. 429. This is a very strong case in favour of our construction. In *Kirkpatrick vs. Kirkpatrick*, 13 *Ves*. 475, Lord *Eldon* held that there *might* be an *indefinite failure of issue*, notwithstanding the words of the will were—"If either die under 21, and without issue." But in that case there were words sufficient to tie up the failure of issue within the period prescribed, and as it was *personalty*, it became absolute at 21. *Tenny's Lessee vs. Agar*, 12 *East*, 253, (in 1810,) is a strong case for our construction. There, *Bayly*, J. says, if son had died leaving issue, which issue had died immediately after, it was the testator's meaning that the devise over should not fail absolutely; and yet it must have failed if the contingency depended on the son's dying without issue *at the moment of his death*. The meaning was, as in most cases it is, that the devise over shall take effect when the son dies and his issue fails, let it fail when it may, whether before, or at, or after the son's death. And this is what we understand by an indefinite failure of issue. *Anderson vs. Jackson*, 16 *Johns. Rep.* 412. Devise of real estate to A, and if he die under 21, and without issue, to B, in fee—An estate tail in A. *Roosevelt vs. Thurman*, 1 *Johns. Ch. Rep.* 227, 228. *Cruger vs. Heyward*, 2 *Desaus. Eq. Rep.* 112. *Howell vs. Tilden & Blay*, in the court of appeals of *Maryland* in 1735. *Smith vs. Smith*, 2 *Harr. & Johns.* 314 *Jackson vs. Billinger*, 18 *Johns. Rep.* 369. As to the case of *Barnitz Lessee vs. Casey*, 7 *Cranch*, 462, that was decided on the want of proof of actual ouster, and the case did not turn on the quantity of estate taken by *John M'Connel*. It was immaterial whether he took a fee or an estate tail, as both he and *J. B. Hammond* died under age, and without issue, and their collateral heirs were heirs of the testatrix. The cases cited by Mr. Justice *Story* are not authorities for the extra judicial *dictum*, that *John M'Connel*, on attaining 21, became vested with a *fee simple absolute*. He cites *Framingham vs. Brand*, 1 *Wils.* 140, decided in 1746, which merely decided that *or* might be construed *and*, but it does not appear whether the plaintiff claimed as heir to the devisor, or to the first devisee. *Thurstout vs. Denny*, 1 *Wils.* 270.—Here was a marriage settlement, and an appointment by a subsequent will. The question was, whether the power was well executed, and whether the executory devise was too remote? It could not be a good remainder, for it was not created at the same time with the life-estate, nor by the same instrument. *Goodman vs. Goodright*, 2 *Burr.* 872, was also a marriage settlement, and there was no question as to the *quantity of estate*, nor was it decided whether it was an executory devise or a contingent remainder. In the first case, Lord *Mansfield* held it too remote. In the latter, that it was barred by fine and recovery. *Cook vs. Gerrard,* 1 *Saund.* 174, is not at all in point, but on another subject. *Baker vs. Suretees,* 2 *Stran.* 1175.—"If he die before 21, or marriage, and without issue," then over. The grandson attained 21, and died without having been married. Held, that the plaintiff might recover, claiming under him. It does not appear how he claimed, whether under a fine and recovery suffered by the grandson, or as heir to the first testator, and also heir to the grandson, the first devisee, who was also heir to the testator. And the devisee over could not be entitled, as the contingencies had not both happened upon which alone he was to take. So that Mr. Justice *Story's* opinion is unsupported by the cases he cites. And as to the case of *Hauer vs. Sheetz,* 2 *Binny,* 532, there the opinion of the court proceeds on the ground of a personal charge upon the first devisee, which carries a fee, and rebuts the legal implication of a less estate. And all the other cases in *Great Britain,* and in the several states, where the words "if he die under 21, and without issue," after a fee, are held to create a good executory devise, are founded upon *Pells vs. Brown,* which case is impeached in *Plunket vs. Hornes,* 1 *Siderfin,* 47, and in *Anderson vs. Jackson,* 16 *Johns. Rep.* 406, 407, by Chancellor *Kent.* And the construction was made from subsequent events, and not from the words of the will at the time of the creation of the estate. Such cases are not entitled to as much respect as the old established rules of the common law, however venerable may be the names which have at times appeared to sanction these modern innovations.

Curia adv. vult.

Buchanan, Ch. J. at the present term, delivered the opinion of the court. On the 11th of August 1755, *Frances Middlemore* made her will, the second clause of which is in these words:—"I give and devise unto the aforesaid *Richard Dallam* and *Josias Dallam,* and to their heirs and assigns forever, as tenants in common, equally to be divided between them, all that tract of land called *Palmer's Forrest,* lying on the west side of *Swan* creek; but if either of them dies before the age of twenty-one years, and without issue, then I will that one equal half part of the said land he held and enjoyed by *Gould-*

smith Garretson, (son of *George* and *Martha Garretson*,) his heirs and assigns, forever, to whom I give and devise the same accordingly. And in case the said *Richard Dallam* and *Josias Dallam* should both die before the age of twenty-one years as aforesaid, and without issue, then I give and devise the whole of *Palmer's Forrest* to the aforesaid *Gouldsmith Garretson*, his heirs and assigns forever."

Richard Dallam and *Josias Dallam* entered upon and took possession of the land so devised to them, and caused it to be divided. *Richard* married and had two sons, *John* and *William*, now living, and died in the year 1820, aged 74 years, after having conveyed his part to his son *John*. *Josias* sold all his part, except about 125 acres, the premises in question, of which he died seized in the year 1820, at the age of 72 years, leaving a number of children, now living, of whom *Francis J. Dallam*, the tenant in possession is one, and *William M. Dallam*, the lessor of the plaintiff below is another, claiming as eldest son and heir in tail. And the question raised is, what estates did *Richard* and *Josias Dallam* respectively take under that devise—estates in fee simple, or estates tail?

It would be an unprofitable, and almost endless task, to go through an examination of the multitude of authorities in relation to this subject; a few only of which will therefore be noticed in the exposition that is proposed to be made of the principles governing the decision of this case.

The case of *Soulle vs. Gerrard, Cro. Eliz.* 525, was much relied upon, in the ingenious argument of the counsel for the appellee, to show that *Richard* and *Josias Dallam* took estates tail only. The devise in that case was to *Richard*, one of the devisor's sons, and his heirs forever; and if he died within the age of twenty-one years, or without issue, that then the land should be equally divided amongst his three other sons; and it was held that *Richard* took only an estate tail; the whole of the judges being of opinion, that the devise over, so far as it was on his dying within the age of twenty-one years, being after a fee, was void, on the ground that a fee could not be limited by will after a fee. They therefore rejected altogether the contingency of his dying within age, and construed the other contingency of his dying without issue, as being explanatory of the word heirs, and restricting it to mean heirs of his body; and thus virtually reduced it to the case of a limitation over on the single contingency of his dying without issue.

By the ancient common law no remainder could be limited over after an estate in fee simple, nor a freehold be created to commence *in futuro.* But that strictness has been greatly relaxed in favour of dispositions of estates by will, and the settled rule now is, as it has been for ages, that by way of executory devise, a fee simple, or other less estate, may be limited after a fee simple; and the familiar example put in the books, is of a devise to one and his heirs, and if he dies before the age of twenty-one, then over to another and his heirs. In *Soulle and Gerrard* the court went expressly upon the assumption, that that could not be; no distinction was attempted to be taken between a definite and indefinite failure of issue, nor was there the slightest intimation, that the first contingency, of the devisee *Richard* dying within the age of twenty-one, could not have the effect to restrict the subsequent words "without issue," to mean a failure of issue at the time of his death. But the judges, considering the contingency of his dying within twenty-one, as standing in the way of the subsequent words, "without issue," and (if suffered to remain,) preventing their explaining the word "heirs" to mean heirs of his body, and thus to constitute the devise to *Richard* an estate in fee simple, they rejected the contingency of his dying within twenty-one, and construed the will as if it did not contain that provision, but only a limitation over on the simple contingency of his dying without issue. That case, therefore, cannot at this day be relied upon as authority, to show either that there cannot be a good limitation by will after a fee simple by way of executory devise, or that, in the case of a limitation over, on the double contingency of a dying before the age of twenty-one, and also without issue, the contingency "of dying before the age of twenty-one" does not restrict the words "without issue" to mean a definite failure of issue; that is, a failure of issue at the death of the first devisee. On the contrary, it would rather seem, that but for the principle assumed and acted upon by the judges, that there could not be a limitation by will after a fee simple, they would have considered the first contingency of "dying within the age of twenty-one years," as limiting the second "without issue" to mean a failure of issue at the death of the first devisee; otherwise they would not have felt themselves constrained to reject the first contingency, in order to let in the words "without issue," to explain the sense in which the words "and his heirs forever" were used in the devise to *Richard;* as it was only on the ground that the contingency of his dying within the age of twenty-one would have the effect to restrain the other contingency "of his dying without issue," to a failure of issue at the time of his death, that he could have been held to take an estate in fee simple.

An executory devise, unlike a remainder, needs no particular estate to support it; but no limitation can be good as an executory devise, unless it be on a contingency, that *must* happen, if at all, within a life or lives in being, and twenty-one and a fraction of a year afterwards. And if it be limited in an event, which may not happen within the prescribed limits, as upon an indefinite failure of issue, it is void; for the possibility at its creation, that the event, on which it is made to depend, may not take place within the time allowed, vitiates it from the beginning, no matter how the fact turns out afterwards. Nor can any limitation be construed to operate as an executory devise, where consistently with the rules of law, and the intention of the testator, (which when not contrary to law must always prevail,) it may take effect as a remainder.

It is established by the authority of more than fifty adjudged cases, that wherever there is a devise of real estate to one and his heirs, with a limitation over if he should die without issue; the words "without issue," mean an indefinite failure of issue, that is, not a failure of issue at the time of the death of the devisee, but a failure whenever they shall become extinct, without reference to any particular time or event; if there be nothing in the will showing a different intention on the part of the testator, and restricting the failure to the time of the devisee's death, or to some other time or event.

In every such case, the contingency is too remote to support an executory demise, as the event on which it is made to depend, (the failure of issue,) may not happen within the prescribed limits, a life or lives in being, and 21 years and a fraction of the year afterwards, allowing for the time of gestation. But it is construed to be an estate tail in the first devisee, and the limitation over operates as a contingent remainder, expectant upon the precedent particular estate tail.

But wherever there are expressions in the will restricting the "dying without issue" to a failure of issue, at the time of the death of the first devisee, or to some other time or event which must occur, if at all, within the time allowed for the happening of a contingency, in which an executory devise may be limited, there the first devisee takes an estate in fee simple, and the limitation over is void as a remainder, but good by way of executory devise—as if the words be "without issue living at the time of his death," or "without issue living at a time specified." These are rules, for the construction of wills, so well settled, and so long acted upon, as to have become maxims of the law that are not now to be questioned.

Whether the intention of the testator is always arrived at and gratified by these rules of construction, is not now a question open for examination. In construing a will, the particular words of which have received a settled technical construction, that has become a rule of property, that construction ought to be adhered to and preserved as a fixed and established land mark.

With these principles kept in view, it remains to be examined, by which of those rules the devise before us is to be governed; whether the words "without issue" mean an indefinite failure of issue, or whether they are restricted to mean a failure of issue at the time of the death of *Richard* and *Josias Dallam* respectively.

In *Pells vs. Brown, Cro. Jac.* 590, the devise was of lands by *William Brown*, to his son *Thomas*, and his heirs forever, and if *Thomas* died without issue, leaving *William* his brother, that then *William* should have those lands to him, and his heirs and assigns forever. And it was adjudged that *Thomas* took an estate in fee simple, and that the limitation over to *William* was good as an executory devise; on the ground that the words "without issue," as there used, did not mean an indefinite failure of issue, but were explained and restricted by the words "living *William*," to mean a dying by *Thomas* without issue living, in the lifetime of *William*; and were not used to qualify the word "heirs" in the devise to *Thomas*, and to show that it was the intention of the testator, to restrain them to heirs of his body, but only to designate an event, on the happening of which the estate in fee simple before devised to him was to determine or be defeated, and the contingent limitation to *William* to take effect—which it was held could only be by way of executory devise, and not as a remainder, which could not be limited after a fee simple.

That is a leading case upon the subject, and is put as an example of a good executory devise, in 2 *Fearne Cont. Rem.* 17, 52. 4 *Cruise on Real Property, (Am. Ed.)* 441. *Purefoy vs. Rogers*, 3 *Saund.* 388, *(note 9.)* 3 *Com. Dig.* 431, and referred to in *Porter vs. Bradly*, 3 *T. R.* 146; and *Roe vs. Jeffery*, 7 *T R.* 592—as the "foundation of this branch of the law;" and that case cannot in principle be distinguished from this. There, the contingency on which the limitation over was to take effect, to wit, a dying without issue in the lifetime of another, was to happen within a life in being; here, within 21 years. And there is no want of adjudged cases, down to the present time, to show in what manner devises such as this have been uniformly construed.

In *Brownsward vs. Edwards*, 2 *Ves.* 243, where the devise was to one in tail, but if he died before 21, and without issue, then over to another, Lord *Hardwicke* held, that the limitation over was good by way of remainder, because an estate tail was capable of supporting a remainder; but that, if the first devise had been to the devisee and his heirs, that construction could not have been made; for where there was such a contingent limitation, the court had not changed "heirs" unto "heirs of the body." In *Walsh vs. Patterson*, 3 *Atk.* 193, the devise was by a father to his son, and his heirs and assigns forever, but in case he died before he attained the age of 21, or without issue, then to the testator's wife, and her heirs. Lord *Hardwicke* said, "he thought it a very plain case; and that if the testator had gone no farther than the first clause, he would have given the son an absolute fee, but then followed the executory part;" but he held it to be a vested estate in fee in the son, and as he arrived at the age of 21, though he died without issue, yet that it did not go over to the mother, but descended to his heirs at law. Thus clearly showing, that the words "without issue" were not considered, in such cases, as explanatory of the sense in which the word "heirs" was used in the preceding clause, and as narrowing it down to mean heirs of the body; otherwise the son in that case must have been held to take an estate tail, with a contingent remainder in fee to the mother; but as a mere contingency, restricted to the dying by the first devisee, under the age of 21, and without issue living at the time of his death; by the happening of which the preceding estate in fee was to be defeated, and the limitation over to take effect by way of executory devise. And in *Framlingham vs. Brand*, 1 *Wils.* 140, reported also in 3 *Atk.* 390, where the devise was by a woman to her son *Robert*, his heirs and assigns forever, and if he should happen to die in his minority, or unmarried, or without issue, then over to her son *Harry* and his heirs, Lord *Hardwicke* said he was clearly of opinion, that it was a fee in *Robert*, with an executory devise, and agreeable to all the cases. *Barker vs. Suretees*, 2 *Stra.* 1175, is a similar case.

In *Hauer vs. Sheetz*, 2 *Binney*, 532, the devise was to F, his heirs and assigns forever, (subject to a pecuniary charge,) and if he should die under the age of 21, or without issue, then over to P; and it was held, that F took a fee with an executory devise to P, to take effect upon F's dying under age, and without issue.

It will be seen that in all these cases the disjunctive or (or without issue,) is used, and that the only doubt entertained in either of them was, whether that disjunctive could be read (and;) but it was adjudged in each case, that it should, in order to effectuate the intention of the testator; which is, according to the known rule of construction in such cases, established by a course of decisions for centuries down to the present time. *Small vs. Denny*, 1 *Wils.* 270. *Machin & Vessey vs. Reynolds*, 7 *Serg. & Lowb.* 373; and *Barnitz vs. Casey*, 7 *Cranch*, 456, are free from any difficulty attending the word (or,) the limitation over in each case being on the contingency of a dying under the age of 21, and without issue, dropping the word (or) and using the conjunctive (and,) which is precisely this case.

In the whole of these cases the words "without issue," were considered as not having the effect to reduce the preceding estate in fee simple to an estate tail, but the dying without issue was held to be a mere contingency, on the happening of which, it was the intention of the testator that the fee simple before created should determine. The limitation over, could not, therefore, take effect as a remainder, which cannot be limited after a fee. And it could not have been construed to be good, by way of executory devise, except on the ground, that the words "without issue" did not mean an indefinite failure of issue, which would have been too remote to sustain an executory devise, as the contingency in such case might not happen within the prescribed limits; but that, connected with the preceding words dying within age, or before 21, &c. they were restricted to mean a failure of issue at the time of the death of the first devisee; on the principle of the case of *Pells vs. Brown*, and of *Wilkins vs. Kemeys*, 9 *East*, 366, where the devise was to B, and her heirs, but if she died before A, or without heirs of her body, then to C; and it was held that the devise over to C, could only take effect, if B died before A and without issue. And it does seem that a limitation over, on a dying within age, or under 21, and without issue, must necessarily mean a dying without issue living at the time of the death of the devisee, and being a contingency that must happen, if at all, within the time allowed, it is a good contingency in law to support an executory devise. The plain meaning of such a clause is, that if the party dies before 21, *eo instanti* the fee before given to him shall determine, and the estate pass over to another, provided there be no issue at the time of his death—the dying before 21 and also childless, making together the event on which one estate is to cease, and the other begin—and both must occur, to give life and effect to the limitation over; so that if the first devisee either attains the age of 21, or dying before 21 leaves issue, the fee, before defeasible, thereby becomes absolute, and the limitation over defeated. And it is not like the case of a limitation over on a dying "without issue" generally, which, however a plain man might understand it, is now, when applied to real estate, technically construed to mean an indefinite failure of issue, though the same rule does not extend to dispositions of personal property.

Upon the whole, we think, both on authority and principle, that the words "without issue" in this case, cannot be so construed as to turn the fee simple before devised into an estate tail, without violating the clear intention of the testatrix; and that *Richard Dallam* and *Josias Dallam* each took an estate in fee in the premises respectively devised to them, defeasible by the event of his dying before he attained the age of 21, and without issue, but which became absolute on his arrival at the age of 21. And being a fee in its creation, the limitation over was void as a remainder, though it would have been good by way of executory devise, if the contingency had happened on which it was made to depend; but that not having happened, the executory limitation over can never take effect. *William M. Dallam* then, has no title to the land in question as heir in tail; but his father *Josias*, being seized of an absolute estate in fee simple, it would, under the act of 1786, *ch.* 45, the act to direct descents, have descended to his heirs in fee, that is, to all his children equally, if he had died intestate; and *William M. Dallam* would have been entitled to an equal share with the other children in fee simple, and no more.

DORSEY, J. Although much time was consumed in the argument of this case, it presented for decision but one question, on which, it is difficult to conceive, how a doubt could remain on the mind of the learned counsel who had made that full and elaborate examination of the authorities on the subject, so conspicuously displayed before this court. The material facts in the case are simply these—*Frances Middlemore,* of *Baltimore* county, in 1755, made her last will and testament, in which are the following clauses: "*Imprimis.* I give and devise unto *Josias Dallam,* (son of *William* and *Elizabeth Dallam,)* and to the heirs of his body, all those tracts of land called *Fanny's Inheritance* and the *Union,* lying on the north side of *Swan* creek, near the *Cranberry*; and in default or want of such issue, to his brother *Richard Dallam,* and to the heirs of his body; and in default of such issue to *George Gouldsmith Presbury,* (son of *George Presbury,)* his heirs and assigns forever. 2dly. I give and devise unto the aforesaid *Richard Dallam* and *Josias Dallam,* and their heirs and assigns forever, as tenants in common, equally to be divided between them, all that tract of land called *Palmer's Forrest,* lying on the west side of *Swan* creek, but if either of them dies before the age of twenty-one years, and without issue, then I will that one equal half part of said land be held and enjoyed by *Gouldsmith Garrettson*, (son of *George* and *Martha Garrettson,)* his heirs and assigns, forever; to whom I give and devise the same accordingly. And in case the said *Richard Dallam* and *Josias Dallam* should both die before the age of twenty-one years, and without issue, then I give and devise the whole of *Palmer's Forrest* to the aforesaid *Gouldsmith Garrettson*, his heirs and assigns, forever. 3dly. I give and devise unto the aforesaid *Gouldsmith Garrettson*, and to his heirs and assigns forever, all that tract of land called *The Grove*, lying near the head of *Musquito* creek. 4thly. I give and devise unto *Susanna Hall*, daughter of *John* and *Susanna Hall*, and to her heirs and assigns forever, all that tract of land called *Invention*, lying on the west side of *Spesurtree* creek. 5thly. I give and devise to *Henrietta Holland*, daughter of *Francis* and *Susanna Holland*, and to her heirs and assigns forever, all that tract of land called *Middlemore's Angle*, lying on the branches of *Swan* creek. 17thly. I devise the residue of my real estate unto the aforesaid *Richard Dallam* and *Josias Dallam*, their heirs and assigns, as tenants in common, equally to be divided between them." These are the only devises of real property contained in the will. *Richard* and *Josias Dallam* both arrived at the age of twenty-one years, divided *Palmer's Forrest* between them; and *Josias Dallam* died in 1820, seized under the devise aforesaid of part of *Palmer's Forrest*, and leaving eleven children, of whom the appellee's lessor is the oldest son, and the appellant another of his sons and one of his executors, who were directed by his will to sell the premises in question.

Did *Josias Dallam*, by the second clause in *Frances Middlemore's* will, take in a moiety of *Palmer's Forrest* an estate in fee tail? is the only point to be considered. If yea, then is the appellee entitled to recover, and not otherwise. No lawyer can read this will and hesitate in admitting that it was drawn with great perspicuity and professional skill, and that its writer well understood the established and legal import of the terms and expressions which it contains. In arriving at its true exposition, the court must look to the intention of the testatrix, which they are bound to effectuate, if not inconsistent with the rules of law. Whence is this intention to be collected? Not from mere conjecture, but from the clauses and expressions contained in the will itself. These are to have their plain and popular interpretation. And if formal or technical terms are used, they are to be construed according to their legal import, if such construction contravene not the intention of the testatrix. The devisor having used the words "heirs," "heirs of the body," and "issue," we are bound to say she understood the meaning of each expression, nor can we substitute the one for the other, but to gratify her manifest intention; or, as is emphatically said by Justice *Buller* in *Doe vs. Perryn*, 2 *T. R.* 49, "unless by unavoidable and necessary construction to make sense of the will."

The second clause of the will, prior to the limitation over, gives to *Richard* and *Josias Dallam* an estate in fee simple as absolute as language could make it; being to them, "their heirs and assigns forever." The devise over was intended to take effect upon the happening of two contingencies, and not otherwise; to provide for the annihilation of the estate created in the first devisees, not to change its nature. This interpretation gives to every word of the will its natural as well as legal signification and operation, and accords with the intention of the testatrix, manifestly deducible from other parts of her testament.

By the first clause she devises to *Josias Dallam*, and "to the heirs of his body," with a limitation over, in default of issue, to *Richard Dallam* and to "the heirs of his body," remainder to *George Gouldsmith Presbury* his heirs and assigns forever. Thus showing, that when an estate tail was designed to be created, "heirs of the body" were inserted; when a fee simple, "heirs and assigns for ever." What conceivable reason then can be assigned, if an estate tail only were contemplated in the second clause, that the appropriate phraseology, used in the first (the devisee's too in both instances being the same persons,) should be wholly abandoned, and a substitute introduced, which conveyed an entirely different estate from that intended to be given. Again, in the 3d, 4th, 5th, and 17th sections of the will, where the testatrix evidently designed to pass a fee simple estate, she uses identically the same formal words, "heirs and assigns forever," that appear in the second section in the devise to *Josias* and *Richard Dallam*. Why then should their import, in the latter case, be narrowed down to an estate tail? In obedience, say the counsel for the appellee, to two universal and inflexible rules of law—First, "that wherever a devise is made to one, and his heirs, or heirs and assigns, with a limitation over after failure of issue of the first devisee, such limitation over reduces the fee simple, originally given, to an estate tail." The second, "that no limitation over shall operate as an executory devise, if it can be made to take effect by way of remainder." Before we admit the conclusions which have been drawn from these rules, by him to whose aid they have been invoked, let us inquire whether there be such rules; and if so, how far the legitimate exposition thereof be applicable to the case now at bar. The existence of the first, as an universal rule of law, cannot be admitted. It is special, and not universal; applicable only to cases where the limitation over is after an indefinite failure of issue. No case of authority has been referred to in the argument, and it is believed that none such can be found, where a devise in terms importing a fee, with a limitation over after a definite failure of issue of the first devisee, has been held to invest him with an estate tail only. Upon what principle is it, that after a devise in fee a limitation over, after a general failure of issue of the first devisee, reduces the estate given to an estate tail? It is said in the books, that by the use of the word issue, and the limitation over, the testator explains what is meant by the word "heirs," showing that he intended heirs of the body only. But how this explanation is made manifest, I have no where seen distinctly elucidated in the authorities. Yet, upon a moment's reflection, it is most obvious to the mind of every lawyer. By the limitation over, after an entire failure of issue, the testator most unequivocally declares, that no heir of the devisee shall inherit, who is not his issue. Thus conclusively demonstrating, that by the word "heirs," in the commencement of the devise, he meant heirs of the body. But does the same reason apply to a devise in fee, with a limitation over after a definite failure of issue? Can, in such a case, no person inherit as heir of the devisee, who is not also an heir of his body? Most assuredly he may. Should the issue be not extinct, at the period fixed by the terms of the devise, then the limitation over can never take effect. And if, subsequently to that period, a failure of issue should occur, the heirs collateral of the devisee may inherit the estate devised. The principle then which converts a devise in fee with a limitation over after an indefinite failure of issue, into an estate tail, has no application to a devise in fee with a limitation over after a definite failure of issue. In the last mentioned class of cases a fee simple always passes to the devisee, liable to be defeated by the happening of the contingency upon which the limitation over is made to depend, provided the contingency be such that, by the rules of law, a fee upon a fee, by way of executory devise, may be limited upon it. But if the contingency be too remote, then is the limitation over null and void, and the estate becomes an absolute fee simple in its first inception. It is true that a *dictum* is met with in *Soulle vs. Gerrard, Cro. Eliz.* 525, which at first view might be considered in the teeth of this doctrine; and on this case the counsel of the appellee appeared to rest with the most confident reliance. The only question which should there have been decided, was simply whether "or" should be construed "and," to effectuate the testator's intention; and the facts which presented that point for adjudication were the following: The testator, having four sons, devised the land in dispute to one of them, and his heirs forever; and if he die within the age of one and twenty years, or without issue, that then the land should be equally divided amongst his three other sons. The first devisee had issue, and died under twenty-one years. The parties litigant were the issue of the son of the devisee, and the three surviving sons of the testator. Two points were argued by the counsel—first, that the disjunctive "or" should be taken for the copulative "and;" the second, that the remainder, (as it was improperly denominated,) being limited to depend upon a fee, was therefore void. *Anderson*, Chief Justice, in delivering his opinion, (which was adopted by the rest of the court,) states, "that this part of the limitation, if he die within age," is utterly void, for a remainder cannot depend upon a fee, and then it is all one as if the limitation had been single, "if he die without issue;" so that the first devisee had an estate tail. The court there arrive at this notion, that the first devise is of but an estate tail, by error so manifest, that it is matter of surprise that such a decision should be seriously pressed upon a court of justice at the present day. Their whole opinion is bottomed upon a denial of what is now deemed one of the best established axioms of the law, "that by last will and testament a fee may be limited upon a fee." To bolster up this unsound adjudication, it has been alleged, that it was approved of by Lord *Holt* in *Hilliard vs. Jennings*, 1 *Ld. Ray.* 505; and by *Buller*, Justice, in *Wright vs. Kemp*, 3 *T. R.* 474. The insinuation, that so distinguished a judge as Lord *Holt* had sanctioned an error so egregious, is of itself enough to excite our suspicion of inaccuracy in the reporter; but this suspicion is converted into demonstration, when we look to the same case of *Hilliard vs. Jennings*, in 12 *Mod.* 276, and in *Com. Rep.* 94, where Lord *Holt*, so far from approving, denied the authority of *Soulle and Gerrard.* So far only, I presume, as related to the *dictum* about the estate tail. The opinion of the court, however, in *Soulle and Gerrard*, if entitled to any weight, rather supports than impugns the distinction now assumed, as to the operation of limitations over after definite and indefinite failures of issue. Before they there felt themselves authorised to reduce the estate devised to a fee tail, they were first constrained to reject, as null and void, all that part of the limitation over, which made the estate dependent on a definite failure of issue. The sole question in *Wright vs. Kemp* was, whether "or" should be construed "and;" and after Lord *Kenyon*, in support of that construction, had cited a number of authorities, *Buller*, J. observed, that in addition to the cases mentioned by his Lordship, there is another to the same effect in *Moor*, 422, where the words are, "if he die without issue *or* before twenty-one, then over." He adduced this authority as one where "or" was held to mean "and," having no allusion to the question whether the estate devised were in tail or in fee; and that by this reference he had no such design as is imputed to him by the counsel of the appellee, is most evident on turning to the case as reported in *Moor*, which is in less than five lines, and simply states, that in a devise to his "son, and if he die without issue or before his age of twenty-one years, then remainder to another; the son had issue, but died under twenty-one years, adjudged that the issue took the land, and not the remainderman." Not one word is here to be found about an estate tail; and *Buller*, J. did as every lawyer of modern times would do, views this as a case in which nothing was determined save that "or" meant "and." But the fact is, as was observed by Lord *Hardwicke* in *Framlingham vs. Brand*, 3 *Atk.* 390, "the doctrine of executory devises was not well settled when *Soulle vs. Gerrard* was decided."

An indefinite failure of issue, is where the limitation over is to take effect whenever the issue becomes extinct. A definite failure of issue, is where the limitation over is only to take effect upon the issue's becoming extinct within some specified period. Has the testatrix in the case at bar tied up the failure of issue of the first devisee to any particular time, and is the time prescribed such as by the rules of law will permit a fee to be limited upon a fee? are the questions before us. And these questions have been so frequently decided in cases in *totidem verbis*, or even stronger against the appellee, that it is only necessary to refer to them to silence forever all doubt on the subject. In *Hanbury vs. Cocherill*, 1 *Roll. Abr.* 834, the testator devised lands to his son B in fee, and other lands to his son C in fee, subject to a proviso, that if either of his sons should die before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then he gave all the lands, which he had given to such of his sons that should so die, &c. unto such of his sons as should the other survive. It was held that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one years of age, and without issue. In *Barker vs. Suretees*, 2 *Stra*, 1175, the devisor gave the premises in question to his grandson, his heirs and assigns; but in case he dies before he attains the age of twenty-one years, or marriage, and without issue, then over—Held, that the first devisee took the estate in fee, subject to the executory devise over on the contingencies mentioned. In *Walsh vs. Peterson*, 3 *Atk.* 193, the testator gave two thirds of his real estate to his son, to hold to him, his heirs and assigns forever; but in case he shall happen to die before he attain the age of twenty-one years, or without issue, then to the testator's wife, her heirs and assigns. Lord *Hardwicke* held it to be a vested estate in fee in the son. In *Framlingham vs. Brand*, 3 *Atk.* 390, the testatrix devised her house to her son *Robert*, and his heirs and assigns forever; and in case he shall happen to die in his minority, and unmarried, or without issue, she gave it to her son *Harry*, and his heirs. Lord *Hardwicke*, in delivering his opinion, says, "the question is, if this was a devise of an estate tail in *Robert*, with remainder over to *Harry*, or if a fee with an executory devise to *Harry* on these contingencies, I am clearly of opinion this is a fee with an executory devise, and agreeable to all the cases." And he further determined, that *Robert* having arrived to the age of twenty-one and died, the house was answerable for his debts. So in *Thrustout vs. Denny and others*, 1 *Wils.* 270, the *feme* by will appoints the premises in question to her son, and his heirs forever; but in case her said son should die before his age of twenty-one years, and without issue, then she devised the land over in fee. The court held this remainder over a good executory devise, assigning as their reason, "as it depended on a contingency to arise within the compass of a life then in being." Between the words of the devise in this will, and of those in the will of *Frances Middlemore*, not the slightest shade of difference is discoverable. In *Buckworth vs. Thirkell*, 4 *Cruise's Dig.* 451, tit. *Devise*, 38, *ch.* 17, *s.* 27, a devise to a grand-daughter, her heirs and assigns forever; and if she die under twenty-one years, and without issue, then to a grandson, and his heirs—Held, by Lord *Mansfield*, a devise in fee in the first taker. In *Gulliver vs. Wickett*, 1 *Wils.* 105, the testator devised lands to his wife for life, and after her death to such child as she was then supposed to be *ensient* with, and to the heirs of such child forever; provided that if such child, as shall happen to be born, shall die before the age of twenty-one years, leaving no issue of its body, then over. The court say, we are all of opinion "that the true construction of this will is, that there is a good devise to the wife for life, with remainder to the child in contingency in fee, with a devise over, which we hold a good executory devise, as it is to commence within twenty-one years after a life in being." In *Barnitz Lessee vs. Casey*, 7 *Cranch*, 456, the same question, (the words being identically the same as those now under consideration,) was argued in the supreme court of the *United States* by some of the most eminent counsel in the Union, and it was decided that the first devisee took an estate in fee, and that the limitation over was good as an executory devise. Many similar adjudications, made in the different states, might be cited, but it is deemed unnecessary to do so.

In neither of the cases referred to is it explicitly stated by the court that the "dying without issue" meant issue living at the time of the death of the first devisee. Yet in all those cases such must necessarily have been their decision, or they could not have pronounced the limitations over good by way of executory devise. There is no other period, to which the failure of issue intended by the devisor can be confined. If it be not thus restricted, then upon the death of the first devisee under age with issue, such issue might be successively continued for fifty generations or ten centuries, and then becoming extinct, both contingencies would have happened upon which the limitation over was to take effect. Thus creating such a perpetuity as the law abhors, and will never permit.

As to the second inflexible rule of law, so earnestly pressed into the appellee's service, it is difficult to conjecture what application can be made of it for his benefit. If the court should be of opinion, that the intention of the testatrix is apparent, and sufficiently expressed on the face of the will, to vest in *Josias Dallam* an estate in fee, with a limitation over by way of executory devise, according to the rules prescribed by law for that purpose, then the maxim of law relied on, "that a limitation over shall never be construed an executory devise, if it can be made to operate by way of remainder," can have no operation; as after a fee, nothing remains to be given. It is the duty of the court in all cases, first to elicit the intention of the testator from the will itself, as to the extent of the interest intended to be conferred on each devisee. This being done, then to devises of the character of that before us, this rule of law is to be applied; and if the limitations over can, consistently with the testator's intent, take effect by way of remainder, they can never operate as executory devises. "But (in the language of *Fearne* 205,) this rule or principle, or maxim of construction, that a limitation shall never operate as an executory devise, where it may take effect as a remainder, may be overruled, where the intent of the testator, or author of the trust or limitation, plainly appears to contradict the legal construction of the limitation; for the intent of the testator shall always prevail, if not contrary to law; which means, if the limitation be such as the law allows; but does not mean that the words shall be taken in such sense as the law imposes upon them."

It has been urged upon the court that the opinion of Chancellor *Kent*, in *Roosevelt and others vs. Thurman*, 1 *Johns. Cha. Rep.* 220, is in point in favour of the appellee. If this were so, I should ponder well before I disregarded so high authority. But Chancellor *Kent* has made no such decision as has been imputed to him; the counsel, it is presumed, has been led into this error, in part, by a palpable mistake committed by the reporter, in giving the marginal contents of the decree; in which he states "it was held, by the words "dying without issue," the devisee took an estate tail by the *English* law, or an estate in fee under our statute;" whereas the decision of the Chancellor was, that he took either "an estate in fee, or an estate in tail, under the *English* law," which estate tail, by the statute of *New York*, is made an estate in fee. He gives no express opinion upon the point now in controversy, as it did not arise in that case; but as far as his views can be collected from what he did say, they are in perfect harmony with the adjudications referred to in support of the appellant's pretensions.

Too much time has already been consumed in reviewing authorities in which there is scarcely to be found a shade of discrepancy. The true construction of the second clause of *Frances Middlemore's* will, (as far as relates to this controversy,) is, that *Josias Dallam* took an estate in fee in a moiety of *Palmer's Forest*, subject to an executory devise over, to take effect in the event of his dying under the age of twenty-one years, and without issue living at the time of his death. I think, therefore, that the judgment of the county court should be reversed, with costs. JUDGMENT REVERSED.

STODDERT *vs.* NEWMAN.—June, 1826.

Under the acts of assembly of 1785, *ch.* 80, and 1809, *ch.* 153, authorising amendments "in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial," the *writ* cannot be amended.

Where that is to be done, it must be by the titling, or by some other part of the proceedings, agreeably to the law prior to such acts of assembly.

In an action of *assumpsit* against N, to charge her as executrix of C, with rent accruing after C's death, upon a demise from the plaintiff to C, evidence must be given on the plea of *non assumpsit* of her being executrix, as well as that she occupied the demised premises.

In an action against the assignee of a term to recover the rent of the demised premises, general pleading is allowable; but it must be shown, as well as generally alleged, that the defendant is either in fact or in law assignee.

To support an action for use and occupation a demise must be shown, or some evidence given, to establish the relation between the parties of landlord and tenant.

Where on a *demurrer* judgment is given against the plaintiff, and he asks leave to amend the pleading demurred to, and does amend, he is considered as acquiescing in the judgment, and as abandoning his right to appeal from it.

APPEAL from *Charles* County Court. This was an action of *assumpsit* brought by the present appellant, (the plaintiff below,) against the defendant, (the appellee,) as executrix of *Francis Newman*, to November term 1820. At March term 1822 a declaration was filed by the plaintiff against the defendant, as executrix as aforesaid, to recover the sum of $250 for the rent of a house and lot, which he had rented by a written contract to one *Francis Newman*, the husband of the defendant, on the 21st of January 1818; that *Francis Newman* died, not having entered, leaving the defendant his executrix, who entered into the premises, and held them one year, &c. The defendant pleaded *non assumpsit*, and *plene administravit.* The plaintiff obtained leave to amend at August term 1823, and filed a new declaration nearly similar to the first, charging the defendant as assignee of the term, and with having entered after her husband's death, as executrix, &c. To this declaration the defendant pleaded *non assumpsit*, and *plene administravit*. The plaintiff joined in issue to the first plea, and demurred generally to the other. The county court overruled the demurrer; and on motion of the plaintiff, gave him leave to amend his writ and declaration. The writ and declaration were amended, changing the action to one against the defendant in her own right. This new declaration contained *three* counts—1. That on the 21st of January 1818, the plaintiff entered into an agreement with a certain *Francis Newman*, at his special instance and request, that he should use, occupy, possess and enjoy, a certain messuage called *Mont Bleak*, the property of the plaintiff, lying and being in, &c. with the appurtenances and premises, for the space of one year fully to be complete and ended, from the said 21st of January, at the price of $250. After which agreement, and before entry by the said *Francis* into the said tenement, and before the expiration of the said term, the said *Francis* died, to wit, on the 1st of February in the year aforesaid, to wit, at, &c. having made and executed his last will and testament in writing, by which the defendant was appointed executrix thereof, and letters testamentary were in due form of law granted to her by the orphans court of *Charles* county aforesaid, to wit, on, &c. By which said agreement, and the commission of the said letters testamentary, the defendant entered into the said messuage and premises, and the appurtenances thereunto belonging, and was thereof possessed, to wit, on the 1st of February 1818, at, &c. and the same had, held, used, occupied and enjoyed, for a long space of time, to wit, for one whole year; by reason whereof the defendant became liable to pay to the plaintiff the said sum of $250; and being so indebted, in consideration thereof afterwards, to wit, on, &c. at, &c. undertook and faithfully promised to pay the plaintiff the said sum of $250, when she should be thereunto requested. 2. That *Francis Newman* in his lifetime, to wit, on the 21st of January 1818, entered into an agreement with the plaintiff in these words: "It is agreed between Mrs. *Newman*, on the part of Col. *Newman*, and *J. T. Stoddert*, that the lot at *Port Tobacco* shall be occupied by Colonel *Newman* and family the present year, and the rent shall be two hundred and fifty dollars. The tenant has the privilege of cultivating the lot in tobacco, or small grain," &c. "The tenant is to deliver the premises up at the end of the year, in as good repair as it is put by the owner for him." And before entry of the said *Francis* upon the said premises, by virtue of the said contract, and before the expiration of the said term, the said *Francis* afterwards, to wit, on the 1st of February in the said year, at, &c. died, having made his will, and appointed the defendant his executrix, to whom letters testamentary were granted on, &c. And afterwards to wit, on, &c. at, &c. the defendant entered upon the tenement and premises aforesaid, and was thereof possessed by virtue of the said agreement, and the commission of the letters testamentary, and was thereof possessed for a long time, to wit, for twelve months at, &c. And the plaintiff avers, that the sum of $250, being one year's rent ending after the death of the said *Francis*, and after the entry of the defendant upon the said premises, to wit, on the 10th of January 1819, was and still is in arrear and unpaid to the plaintiff; in consideration whereof the defendant afterwards to wit, on, &c. at, &c. undertook and faithfully promised to pay the plaintiff the last mentioned sum of money when she should be thereunto afterwards requested. 3. That the defendant was indebted to the plaintiff on the day and year aforesaid at, &c. in the sum of $250, for the use and occupation of a certain messuage, &c. of the plaintiff, situate, &c. by the defendant, and at her special instance and request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had, held, used, occupied, possessed and enjoyed; and being so indebted, in consideration thereof afterwards, to wit, on, &c. at, &c. undertook and faithfully promised to pay to the plaintiff, the last mentioned sum of money when she should be thereunto afterwards required, &c. The defendant pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiff gave in evidence by *John Matthews*, a competent witness, that in January 1818 he rented the lot belonging to the plaintiff, adjoining *Port Tobacco*, as the agent of the plaintiff, to the defendant, who acted as the agent of Col. *Newman*, her husband, who was then sick, at the yearly rent of $300; that Col. *Newman* died about the 1st of March 1818, before he had entered upon the lot. The plaintiff further gave in evidence the contract for the use and occupation of the lot for the year 1818, as stated in the *second* count in the declaration, and proved by the said *Matthews*, that after the death of Col. *New-*

man, the defendant, about the 1st of March in that year, entered into the lot and premises, and occupied the same until the end of the year. Upon this evidence the defendant prayed the court to instruct the jury, that the plaintiff could not recover either the amount of $250, or a proportional part for the time the defendant occupied the premises. Which instruction the Court, [*Stephen*, Ch. J. and *Key* and *Plater*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER, and DORSEY, J.

R. Johnson, for the Appellant, contended, that the judgment ought to be reversed—1. Because the plea of *plene administravit* was not a sufficient plea in a case of this description—the defendant, by entering after her husband's death, and without his having entered, having made herself personally liable for the rent of the demised premises. 2. That upon the facts stated in the bill of exceptions, the defendant was also liable in a suit against her individually, to pay, if not the whole rent, at least a reasonable rent for the time she occupied the premises.

He insisted that advantage could be taken of the judgment entered by the court on the demurrer, as that judgment does not appear to be stricken out, but leave only given to the plaintiff to amend. The defendant was sued as executrix for rent, where she had herself enjoyed the premises after the death of her testator. She pleaded *plene administravit*, which was a bar to the whole declaration. To this plea there was a demurrer, which the court improperly overruled. To show that advantage could now be taken of the judgment on the demurrer, and of any errors in the record, he cited *Hughes's Lessee vs. Howard*, 3 *Harr. & Johns.* 9. *Speake vs. Sheppard*, 6 *Harr. & Johns.* 81. *Hutchings vs. Talbot et al. Lessee*, 3 *Harr. & Johns.* 378. To show that an executor or administrator is liable *de bonis propriis* for rent accrued after the death of his testator or intestate, he cited *Jevens vs. Harridge*, 1 *Saund.* 1, (*and notes.*) *Buckley vs. Peck*, 1 *Salk.* 316, 317. *Toller*, 279. *Tilney vs. Norris*, 1 *Ld. Raym.* 553. S. C. *Carthew*, 519, and 5 *Com. Dig.* tit. *Pleader*, (D. 2, 9.)

Stonestreet, for the Appellee.

EARLE, J. delivered the opinion of the Court. Before this case was brought to trial below, the pleadings in the cause were several times amended, on the motion of the plaintiff, the appellant in this court. The last amendment changed the writ from a suit against *Elizabeth H. Newman*, executrix of *Francis Newman*, to an action against her in her own right, for the purpose of making her personally liable for rent that had incurred after she took possession of certain demised premises, leased to her husband a little before his death. The two first counts of the declaration accordingly allege, that the plaintiff, on the 21st of January 1818, leased for one year to *Francis Newman*; that *Francis Newman* died soon after, and before he had entered; and that *Elizabeth H. Newman* took letters testamentary on his estate, and by virtue of the lease, and the letters committed to her, possessed herself of the leased premises, and occupied them the remaining part of the year. On the trial of the general issue of *non assumpsit*, all these facts were proved by the plaintiff to the jury, save the fact of *Elizabeth H. Newman* being the executrix of *Francis Newman*, which he could not prove as alleged, or overlooked in stating the evidence in the bill of exceptions. In the absence of testimony of this material fact, the court rightly determined, that *Elizabeth H. Newman* was not liable for the sum claimed of her, as far as it was sought to charge her therewith on the two first counts. The object was to sustain the suit against her as assignee in law of the term, which could only be done by showing her to be executrix of the lessee, and that she possessed the demised premises under the letters testamentary, when the rent became due to the lessor. On such occasions general pleading is allowable, but it must be shown, as well as alleged, that the defendant is either in fact or in law assignee of the term. The plaintiff here has sufficiently charged it in his declaration, but he has failed to establish it in evidence to the jury, and therefore cannot maintain his action on this ground. There is also a third count in the declaration, which the plaintiff has not succeeded to support by testimony. This alleges the use and occupation of the same premises by *Elizabeth H. Newman*, by the sufferance and permission of the plaintiff, which permission he has not attempted to prove in any way. To support an action for use and occupation, a demise must be shown, or some evidence given, to establish the relation of landlord and tenant, between the plaintiff and defendant. *Smith vs. Stewart*, 6 *Johns. Rep.* 48. In this case no direct proof has been offered for this purpose, and it cannot be presumed from the facts given in evidence to the jury. A lease to *Francis Newman*, a little before his death, is in proof, and it excludes the inference that *Elizabeth H. Newman* held under a demise to her. *Non constat* that she was the executrix of *Francis Newman*, and no other person than his executor or administrator had a right to possess and hold the leased premises. The executor or administrator might assign, but the lessor, the plaintiff in this suit, cannot be presumed to have had any thing to say to the premises, after he leased them to *Francis Newman*.

We forbear to express any opinion in relation to the judgment of the court on the demurrer to the plea of *plene administravit*. It does not appear to us to be embraced in the appeal taken in the case by the plaintiff. Subsequent to its being pronounced, all the pleadings that led to the demurrer, underwent an amendment on his motion, which would hardly have prevailed, if a design of appealing had been then avowed by him. Indeed his very motion to amend, implied his acquiescence in the court's decision, and is to be considered a waiver of his right of appeal, if it could be exercised, after the pleadings anterior to the demurrer had given place to the new or amended pleadings.

We might also well observe silence with regard to the amendments in the pleadings made in the court below, and which were brought into view on the argument of this case. They were made in favour of the plaintiff on his own application, and the appeal comes alone from him. But as there is a diversity of opinion on the true construction of the act of 1785, *ch.* 80, *s.* 4, and of the act of 1809, *ch.* 153, *s.* 1, which is like it, and the practice of amending writs under those acts has been variant in different judicial districts of the state, we esteem this a fit opportunity to settle the law on this subject. The words of the acts are, "the courts of law shall have full power and authority to order, and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial." These general expressions we interpret to mean, all proceedings in a cause subsequent to the return of the writ, and as not authorising an amendment of the writ itself, which furnishes the question, the merits of which is to be tried between parties. To alter the writ, it would seem would be to change the question between the parties, instead of bringing it fairly to trial between them—when the writ is to be amended, it must be by the titling, or by some other part of the proceedings, agreeably to the law prior to the said acts of assembly.

JUDGMENT AFFIRMED.

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Bohn *vs.* Headley.—June, 1826.

A deed of gift of personal property from a father, (who was not indebted at the time,) to his child, executed, acknowledged and recorded, according to law, conveying the property to the child, with a provision that the donor was to remain in its possession and use during life—*Held*, to be valid both at common law and under the statute of 13 *Eliz.*

Such a deed is not within the statute of 27th *Eliz.* that statute not relating to conveyances of personal, but of real property.

H, being entitled by deed, at her father's death, to certain slaves, the father sold them as slaves for life to B, who took possession, and used them as his own—*Held*, in an action of trover, brought at the father's death by H, against B, for the slaves, that there must be other evidence of a conversion of the slaves by B, to entitle H to recover.

After the date of the said deed H, who was then a single woman, married. The donor, her father, died during her coverture, and afterwards her husband died, without doing any thing to recover the possession of the slaves—*Held*, that the right to them survived to the wife.

The issue of slaves born during the existence of a tenancy for life, belong to the tenant for life, per *Archer*, J.

Appeal from *Baltimore* County Court. This was an action of trover for slaves. The defendant, (now appellant,) pleaded not guilty, and issue was joined.

1. At the trial the case was admitted to be this—One *Thomas Tucker*, of *Anne-Arundel county*, being the owner of, and having in his possession, the negroes in the following deed

mentioned, on the 7th of September 1796 executed the said deed, whereby he did give, grant, and make over unto his three daughters, *Mary Tudley Tucker*, *Rebecca Fairbain Tucker*, and *Harriet Tucker*, three negro slaves, as follows: Unto his daughter *M. T. Tucker* his negro boy *Ben*, unto his daughter *R. F. Tucker* his negro boy *Charles*, and unto his daughter *Harriet Tucker* his negro girl *Dorcas*, unto his said daughters, and their heirs forever; to have and receive the said negroes at his death, and not before, revoking all further claim unto the said negroes, further than to have the use and labour of them during his natural life. The deed was acknowledged on the day of its date before a justice of the peace of *Anne-Arundel* county, and recorded on the 8th of September 1796, among the records of that county, where *Tucker* then resided. Negro *Dorcas*, in the said deed mentioned, is the negro woman named in the declaration, and the other negroes mentioned in the declaration are the children of *Dorcas*. At the time of making the said bill of sale, *Dorcas* was an infant of the age of seven years, and *Harriet*, the plaintiff, a child of *Tucker*, was at that time an infant of the age of ten years. *Tucker* continued to keep and hold in his possession *Dorcas*, using and employing her as his property, according to the provisions of the deed, until he sold her as herein set forth. On the 18th of December 1810, *Tucker* brought *Dorcas* with the boy *George*, her child, then an infant, to *Baltimore*, and sold and delivered her by the name of *Durkee*, and also the said *George*, to the defendant, as slaves for life to him, for the consideration of $280 then paid to him by the defendant; and executed to him, in pursuance thereof, a bill of sale, which was acknowledged before a justice of the peace of *Baltimore* county on the day of its date, (the 18th of December 1810,) and recorded on the 9th of January 1811 among the records of that county. The defendant has ever since continued to hold *Dorcas* and *George* as his slaves, and had them in possession, together with the other negroes in the declaration mentioned, all of whom are the children of *Dorcas*, and who, together with *George*, were all born during the life of *Tucker*, and all, except *George*, since the said sale to the defendant. The plaintiff continued to live with her father, the said *Tucker*, until he removed from this state into *Virginia* in the year 1814, where she married one *George Headley*. That *Tucker* died in December 1818, and *George Headley* in November 1819. The defendant then prayed the direction of the court to the jury, that the matters so admitted were evidence of fraud in the making the deed aforesaid from *Tucker* to the plaintiff; that the same deed was void, and that the plaintiff was not entitled to recover. This direction the Court, [*Archer*, Ch. J.] refused to give; but instructed the jury that the plaintiff was entitled to recover. The following is the opinion he delivered to the jury. The determination of the question as to the validity of the conveyance by *Thomas Tucker* to *Harriet Tucker*, dated the 7th of September 1796, depends upon the construction of the different statutes relative to fraudulent conveyances. The common law, it is apprehended, cannot reach this case, the gift to *Harriet* being precedent to the acquisition of any right by the defendant. *Bac. Ab.* 307. It has indeed, been said, that the rules of the common law are so strong against fraud that they would reach every case intended to be remedied by the statutes 13 and 27 *Eliz. Kadgoan vs. Kennett, Cowper*, 434. But this remark, it is apprehended, must be confined to those cases where the debt, or right intended to be avoided, had its inception before the commission of the fraudulent act by which it was intended to deceive the creditor, or defeat the pre-existing right. And indeed, independent of the circumstance of the right of the defendant having accrued long subsequent to the voluntary conveyance to the plaintiff, which could prevent it from being the subject of animadversion at common law, the conveyance appears not to be accompanied by any of those sure and certain *indicia* of fraud which would render it void. It does not appear, for example, that there has been a successive transfer of all the donor's property. There appears to have been no secrecy about the transaction; it has been executed and acknowledged and recorded in the usual manner. There seems to be no unusual clauses in it, which would constitute marks of fraud and collusion; no artful and forced dress and appearance given by the parties to the instrument, which would create a suspicion that they were intended to conceal some hidden and fraudulent intention. It is true the owner continued in possession after the conveyance, but it was in virtue of a positive stipulation, inserted in the body of the instrument; and if there had been no such convention between the parties, the mere possession by the donor would have been justified since the passage of the act of 1763, the conveyance having been acknowledged and recorded. If this instrument be void then against a subsequent purchaser or creditor, it must be in virtue of the statutes of *Elizabeth*, above referred to; for there seems to be no principle of common law which could contaminate it. These statutes, being made for the purpose of avoiding fraudulent transfers of property, such a construction has ever been put upon them by courts of justice, as would most effectually carry into execution the intentions of the legislature in suppression of the frauds intended to be guarded against, under whatever plausible devices they might be covered. They have, therefore, had a liberal construction in suppression of fraud; their spirit and purview have been largely considered, and such a construction has been given them as has made them highly beneficent to the community.

The statute 13th *Eliz.* extends to all creditors, and to all others who have any cause of action or suit, or any penalty or forfeiture, either to the state or the citizen, and renders invalid all *voluntary conveyances* against prior, as well as subsequent creditors, with the exception of family settlements and provisions; and even these are void if accompanied with the above mentioned particular *indicia* of fraud. In the absence of these indications, they stand on the same ground with deeds made for a valuable consideration. In cases of family settlements and provisions, conveyances have a preference over debts originating in subsequent contracts; because the consideration, upon which it is founded, proceeds from a most virtuous motive, and it would be inconsistent with every moral principle to give a different determination. The defendant has been supposed, in argument, to stand in the light of a *purchaser*, and not of a *creditor*, and that therefore the stat. 13 *Eliz.* could by no probability reach this case, it applying exclusively to creditors. But in one view of the case he might possibly be considered a creditor, for if he paid for the property on a consideration which failed entirely, he might have his action against the vendor for the sum paid. To make myself better understood, if the first conveyance overreached the subsequent sale, the consideration of the purchase had failed, and he would be a creditor subsequent to the voluntary conveyance, and, but for the consideration, might be considered within the reach of the statute. But if in this view of the case, the defendant can be considered as a creditor, his claim, originating subsequently to the voluntary conveyance, cannot overreach it, as it is founded on considerations of blood and natural affection. A man *not involved* in debt may legally make provision for his children.

In the case of *Ld. Townsend vs. Wyndham*, 2 *Ves.* 11, Lord *Hardwicke* is reported to have said, "that if there is a voluntary conveyance by one not indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, it appears, that it will be good, otherwise not; but it will stand, though afterwards he becomes indebted." It cannot be contended that any of the usual badges of fraud attended the original transaction, nor is there any evidence in the cause to induce the slightest belief that the original conveyance was made with the intent of contracting subsequent debts. The transfer cannot then be considered as coming within any of the provisions of 13th *Elizabeth*.

Let us next inquire whether, considering the defendant in the light of a purchaser, the conveyance to the plaintiff is embraced by any of the provisions of the 27th *Eliz. ch.* 4, against fraudulent conveyances? The object in the passage of this law was to protect purchasers from conveyances made with intent to defraud and deceive. Should this statute be considered as extending to conveyances of personal property, such has been the construction put upon it by repeated determinations of the courts, that it would seem to embrace the present case. Mr. *Roberts*, in his treatise on Fraudulent Conveyances, lays it down as a principle, that a subsequent purchaser may treat a prior voluntary conveyance as a nullity, although he *had notice* of the precedent conveyance. This principle may now, without any inquiry into the reasonableness of it, be considered undeniable, since the determination in the case of *Doe on the demise of Otley vs. Manning*, 9 *East*, 59. It has also been determined, that a voluntary gift, if followed, though at a *long interval*, by an attempt to convey, furnished *presumptive evidence* of an original intent to defraud; and that when the two acts are coupled, to wit, the voluntary conveyance and subsequent sale to a purchaser, this constituted evidence of an *original fraudulent intent*, and made the first conveyance void under the statute. If the language of the statute would at all have justified its extension to conveyances of merely personal property, there appears to be no reason why the courts should hesitate to protect, by it, subsequent purchasers of this species of property; for conveyances of personal property, in fraud of purchasers, are as numerous as conveyances of lands and tenements; and when the general diffusion of this kind of property over the whole mass of the community is considered, the assertion may be safely ventured, that transfers of it are both more important and more numerous. Personal property, it is true, is of a fluctuating and transitory character, but still, with some exceptions, it is capable of being traced and identified. But however just and reasonable in principle its extension might be, courts cannot give an interpretation contradicting the intention of the legislature, as manifested by the language they have used. The words of the statute are *lands*, *tenements* and *hereditaments;* now it is scarcely necessary to say that personal property, at least so far as regards the object of the present suit, cannot be included within either of these terms, their known and received legal signification excluding the idea. Perhaps a reason may be discovered for the use of these terms, from the great care formerly bestowed in the ascertainment of the rights, of what was considered, lasting and permanent, and from the low estimation in which personal chattels were held, being regarded as only a transient commodity, which might be protected in the hands of purchasers by the aid of the common law, without the necessity of legislative provision. From a full consideration of the subject, I am satisfied that neither the common law, nor the statutes, can be so construed as to avoid the conveyance to the plaintiff.

A question has been raised, whether the plaintiff can sustain the present suit? By the statement agreed upon it appears, that the plaintiff in the year 1814 was married to *George*

Headley, and that he died in the year 1819, before the institution of this suit. There does not appear to be any thing in the objection. If the wife survive, any action for a tort committed to her or her personal or real property, before marriage, or to her person or real estate during coverture, will survive to her. 1 *Chitty's Pleading*, 64. If this cause of action originated previous to the marriage, she is certainly properly in court. But the conversion, which is the injury complained of, is alleged in the declaration to have taken place subsequently to the death of her husband; if this be the fact, there is also an end of the objection, provided, after the death of her husband, the property remained to her, as the right of action occurred only from the time of the wrongful conversion. Property in the plaintiff is necessary to support this action. The husband, during his life, never reduced the property in contest into possession. He never exercised any acts of ownership over it, by which his intention of making it his own was demonstrated. No property therefore *vested* in him. It was in fact a mere right of action, which he never deemed it necessary to enforce. After the coverture is determined by the death of the husband, the property and right of action certainly remains to the wife, and not to his representatives. The prayer is therefore overruled. The defendant excepted.

2. The defendant further prayed the court to instruct the jury, that the plaintiff was not entitled to recover in this action the children of *Dorcas*, born after the deed of gift, and during the life of *Tucker*, the grantor. And the Court, [*Archer*, Ch. J. and *Hanson*, A. J.] being of opinion that the children, born during the life of *Tucker*, belonged to him and his assignee, instructed the jury accordingly. The plaintiff excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued on the *first* bill of exceptions, before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Frick, for the Appellant, contended, that the deed of gift from *Thomas Tucker* to the appellee, was *void*. 1. Under the statutes of 13th and 27th *Elizabeth.* 2. At common law. If not, then 3. That it was an instrument *voidable* on its face, and that *Tucker,* by his sale to the appellant, avoided it. 4. That at all events, the children of the negro woman in question, born during the lifetime of *Tucker,* were the property of the tenant for life. 5. That the parties to the action are misconceived.

1. The gift from *Tucker* to *Headley* is *void* by the statutes 13th and 27th *Elizabeth.* The case is of small import as regards the amount, but in principle important to the commercial interest, and to confidence and integrity in dealing. The question is simply, whether the *bona fide* purchaser of a chattel, which was previously the subject of a voluntary gift where the donor retained possession, is protected? Lord *Mansfield* has said that the 13th *Eliz.* was made for the benefit of creditors, and the 27th *Eliz.* for protection of *purchasers.* Now, the 13th *Eliz.* has relation to personal as well as real property; but, as it is said we are purchasers, we are excluded. The 27th *Eliz.* it is said, protects purchasers, but those only of lands, tenements, and hereditaments. These statutes, however, are always named and construed together. No case where one is referred to without calling in aid of the other. *Roberts' Fraud. Conv.* 395. And here, although the distinction is taken, yet it is to show that all voluntary conveyances, though not void against creditors themselves, (without some distinct badge of fraud,) are always so against purchasers. The st. 13th *Eliz.* is said by *English* judges to be declaratory of the common law. Under this statute there is no doubt this gift was void as to *creditors* at the time and subsequent. *Rob.* 15, 16, &c. and *Twyne's* case, 3 *Coke* 80. Yet purchasers who, in the *general* construction of the statute are said to be more favoured, are excluded, because not expressly named in 13th *Eliz.* But there is a phrase in 13th *Eliz.* which it may be assumed was not idly inserted, and means something—the word "others" after creditors. It is *nomen generalissimum*; and it may be argued, that it includes purchasers; and any person who is aggrieved by gifts, conveyances, &c. which the statute denounces, may apply it to himself. It is in fact so applied. *Jackson vs. Myers,* 18 *Johns. Rep.* 425. *Roberts,* 15, *(note d.) Tay-*

lor vs. Jones, 2 *Atk.* 601. And whether at the time, or subsequent, does not alter the case. Again—Admit that a purchaser is excluded from 13th *Elizabeth*, and as to him the gift was good in its inception—What consideration then passed from *Tucker* to *Bohn?* None. Would not then *Bohn eo instanti* become a creditor, and his claim, by relation back, overreach the gift? For what is a subsequent purchaser but a creditor, if the consideration of his purchase fails.

2. But this gift is also void at common law. It was said, that the common law could not reach this case, because the gift was precedent to the debt or right. That was the notion in *Bacon's* time. But Lord *Mansfield* says, in *Kadogan vs. Kennett*, 2 *Cowp.* 434, "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the law would have attained every end without the statute;" that is, the law is the same without the statutes. Then if the statute does not distinguish whether the right be precedent or not, neither does common law. It is not denied that the statute 27th *Elizabeth* would extend to purchasers subsequent. Where do we get this construction? In the statute itself. How is it extended to 13th *Eliz.* where no such words subsequent, &c. are mentioned? From analogous construction, and under the principles of the common law, which are so abhorrent of fraud, that they allow the principles of the one statute to be applied in the construction of the other. It is the common law that permits this construction. And will it be said that the common law furnishes one set of rules to try fraud under the statute, and another to try the same fraud at common law? There is no such doctrine. *See the Newgate case*, 3 *Bac. Ab.* 247, and *Jackson vs. Myers*, 18 *Johns.* 425, *(note* a.*)* We may then premise, that if purchasers are excluded from the benefit of 13th *Eliz.* yet the rules of construction, with regard to conveyances, gifts, &c. therein named, are *general rules*. There presumption of fraud was always derived from an attempt to sell or convey to a purchaser, even after a long interval. *Roberts* 33, 34, &c. This is said to be a gift. Now gifts are not in favour with the *English* law—nor with our own. And a true and proper gift at common law must always be accompanied with

possession, otherwise the donor may retract it. *Spratley vs. Wilson*, 3 *Serg. &. Lowb.* 8. *Jenk.* 109. 2 *Blak. Com.* 441; and *Pearson vs. Pearson*, 7 *Johns. Rep.* 26. A gift is not consummate until delivery, and until then the party may revoke it. A true and proper gift must take effect immediately; otherwise it is no gift, but a contract. In *Twyne's* case, one badge of fraud assigned was, that the donor continued in possession, and by reason thereof, traded and trafficked with others, and deceived them. And in *Edwards vs. Harben*, 2 *T. R.* 587, it was established as a general rule, that unless possession *accompanies and follows the deed*, it is fraudulent and void. These are undeniably principles of the common law. They are the tests which the common law applies in order to try the intent under the statutes, for the statutes say nothing of badges of fraud. They speak of the intent, which is to be argued from the principles of the common law. Recollect also, that in gifts under the statute, the possession passed, and even *such* voluntary gifts the statute avoided—because the *English* law knows but one species of gift, i. e. attended with possession. Does the act of 1763, *ch.* 13, alter the case here. That act justified the donor's possession, which at common law was always a badge of fraud; it did nothing more. It barely removed the presumption of fraud arising from possession. *Garrett vs. Hughlett*, 1 *Harr. & Johns.* 3 & 4. But it did not negative other *indicia* of fraud—as want of consideration, or for affection and blood, or to a son a cousin, relation, &c. *Comyn's Dig.* tit. *Covin*, (B 2.) And here there is no consideration for the deed. The act does not say *all* gifts shall be good, but in the general phraseology of all similar acts. (See 1729, *ch.* 8, *s.* 5.) *No gift* shall *be good without*, &c. It was only intended to take off the presumption of fraud from the possession; but if there be fraud otherwise, acknowledgment and record is no protection. Again, the gifts to which the act relates are common and ordinary gifts, where the donor remains in possession, yet the other requisites of a gift are complied with, (a symbolical delivery, &c.) such as *pass* property. Certainly not conditional gifts or prospective, with express reservation of its future operation, and on its face revocable and avoidable.

3. The gift in this case was revocable on its face; and by the subsequent sale of the negroes by *Tucker* to *Bohn*, he *Tucker*, (as he had a right to do so,) did revoke it. At common law, as before remarked, if a gift was not accompanied with delivery and possession, it was properly a contract. Here there was no such delivery, and the gift was only prospective and conditional, The very terms used are the terms of a will, and as such it may fairly be assimilated to a legacy, or *donatio causa mortis*; and in either case is revocable. *Roberts' Fraud. Conv.* 442. *Spratley vs. Wilson*, 3 *Serg. & Lowb.* 8, *(note.)* "To have and receive at my decease, and not before," is the phrase. Now, can it be urged that any property *passed*, (as is the phrase of the act of 1763,) at the time of the gift, when it thus is expressly negatived; and when he died there was none in him to pass. It is not thus within the acts of 1763, for that certainly does not refer to gifts *in futuro*, and this is no other; no property having passed, and none could pass *in præsenti* from the words used. It cannot be considered a gift under that act; it is not necessarily so because acknowledged and recorded; for usually the acknowledgment refers to the act of assembly in such cases made and provided. Here *Tucker* says it is his act, according to the true intent and meaning thereof. He best knew his own meaning; he gave his own construction when he sold to *Bohn*, and revoked the gift; and for his own honour and memory it is just so to consider it. Beside, *Harriet Tucker* still lived with her father when he brought the negroes to *Bohn*, and made sale of them. It was an act of which she must be supposed to have had knowledge and privity, and both may be considered parties to the sale.

4. As to the issue of *Darkee*, born during the lifetime of *Tucker*, they belong to tenant for life, or his assignee, and cannot be claimed in this action. *Standiford vs. Amos*, 1 *Harr. & Johns.* 526.

5. The parties to this action are misconceived. *Harriet Tucker* having married in the lifetime of her father, the gift enured to *Headley*, the husband, at the father's death, and his representatives as such are the proper plaintiffs. If property be acquired to the wife after marriage, such property belongs absolutely to the husband; so that if husband dies before it is

reduced to possession or is paid, or is due, it would go to his executors, and not to the wife. *Reeves Dom. Relations*, tit. *Baron & Feme, chap*, 4. 3 *Amer. Dig*. 328, pl. 185, cites *Walker vs. Mebane*, 1 *Murph. N. C. Rep*. 41. A distributive share of personal property accruing to a *feme* during marriage, vests in husband, and in case of death goes to his representatives, and not to the wife. *Griswold vs. Penniman*, 2 *Conn. Rep*. 564, cited in 4 *Amer. Dig*. 309, pl. 61.

Mitchell, on the same side. There is no proof from which the jury could infer an actual or constructive conversion. To show that it was incumbent on the plaintiff to prove a demand and refusal, he cited 6 *Bac. Ab*. tit. *Trover*, 678, 682, 706. 2 *Phill. Evid*. 118, 119, *(note.)* *Brown vs. Cook*, 9 *Johns. Rep*. 361. *Sturtevant vs Ballard*, *Ibid* 341. And to show that a will was revoked by a subsequent sale, he cited *Nan Mickel's* case, 14 *Johns. Rep*. 324. 2 *Pow. on Mortg*. 1109, *(note;)* and *Bayard vs. Hoffman*, 4 *Johns. Chan. Rep*. 450.

Hanan, for the Appellee. The gift is not void at common law. 3 *Bac. Ab*. tit. *Fraud*, 7. There is nothing on the face of the deed to show that a fraud was intended; the donor's remaining in possession is stipulated in the deed. *Kadogan vs. Kennett*, 2 *Cowp*. 436. It is a good deed under the act of 1763, *ch*. 13, *s*. 2. And independent of that act it is valid. It is not void under the statute of 13th *Elizabeth*. That statute extends to creditors only. *Kadogan vs. Kennett*, 2 *Cowp*. 434. The statute of 27th *Elizabeth* relates to purchasers of lands, and not of personal property. Was the appellant a creditor? If he was, he was a subsequent creditor. A man not in debt may make a voluntary gift to his children. *Lord Townshend vs. Wyndham*, 2 *Ves*. 11. *Verplank vs. Sterry*, 12 *Johns. Rep*. 557. *Bennett vs. Bedford*, 11 *Mass. Rep*. 390, 421. *Parker vs. Procter*, 9 *Mass. Rep*. 390. *Walker vs. Burrows*, 1 *Atk*. 94. *Middlecome vs. Marlow*, 2 *Atk*. 520. *Rob. on Fraud. Convey*. 452. The deed is good under the statute of 27th *Elizabeth*. *Rob. on Fraud. Convey*. 7. But it has been said that the action is misconceived. The appellee married, and her husband died after her father. By the deed she was not to have the property until after her father's death. This is a *chose in action*, over which the husband exercised no control. It survived to the wife. *Roper on Baron & Feme. Schuyler vs. Hoyle,* 5 *Johns. Chan. Rep.* 209. *Wright vs. Rutter,* 2 *Ves. jr.* 675. *Carr vs. Taylor,* 10 *Ves.* 578; and *Wildman vs. Wildman,* 9 *Ves.* 174.

R. Johnson, also for the Appellee. It has been contended, that it did not appear that there was a demand and refusal. Demand and refusal are only evidence of conversion; other evidence may be admitted of that fact, than that of demand and refusal. The appellant holds and uses the property as his own, which is sufficient evidence of conversion. It has also been contended, that the action is improperly brought, admitting the deed to pass the negro in question to the appellee. In 1814 the negro woman was the right of the appellee, acquired by her previous to her marriage. During her coverture the possession was out of her. The right to sue for the negro accrued during the coverture; but the right to the negro accrued before. Suppose a bond is given to the wife while she is a *feme sole,* on the death of her husband it survives to her, if not reduced into possession by the husband. 1 *Chitty's Plead.* 17, 21. Her right was a legal one before her marriage, but not a right in possession. 2 *Blk. Com.* 433, 434. *The State vs. Krebs,* 6 *Harr. & Johns.* 31. 3 *Bac. Ab.* tit. *Executors, &c.* (H 4,) 65.

The deed was not void at common law. It is a conveyance to a child in the absence of any debts due by the father at the time. The property remaining in the donor's possession was not evidence of fraud, because the deed provided that he should have the use and possession during his life. The deed is not void under the statute of 13th *Elizabeth,* even if the appellant be considered as a creditor. He is, if at all, a subsequent creditor. A deed is never set aside where there is a settlement on the family of the donor, who is not in debt at the time of the settlement. In *Jackson vs. Myers,* 18 *Johns. Rep.* 425, the suit was depending when the deed was made. But can the appellant be esteemed a creditor? He is not a creditor now, being in possession of the negroes. But he is said to be a creditor, because the sale to him is void. This judgment must be affirmed, before he can be considered a creditor. If the judgment is reversed, he would not be one. As a creditor he has no right to hold the property. The statute 13th *Elizabeth* never meant to place a creditor in a better situation than he was in before the deed. *Dorsey vs. Smithson*, 6 *Harr. & Johns.* 64. One creditor has no right to hold the property of the debtor. It is a fraud upon the other creditors to do so. The deed cannot be affected by the statute 27th *Elizabeth*, which relates to real estate only, and was intended to be coextensive with the statute 13th *Elizabeth*.

It has also been insisted that the deed is not a valid deed under the acts of 1763, *ch.* 13, and 1729, *ch.* 8. If the deed comes within the provisions of the act of 1763, then it is a valid one; or if not under that act, it is a good deed at common law. But the deed is within the letter and spirit of the act of 1763. That act intended to provide for all cases where the possession of the property remained in the donor, by the deed's being acknowledged and recorded. It was intended to remedy a defect in the act of 1729. It is also a good deed within the act of 1729, and good against the executors, &c. of *Tucker*.

The deed, it has been said, is to be considered a donation in last sickness. But such a donation must be on the death-bed of the donor, and possession of the property must be delivered; if the donor recovers, the gift is void, and the property reverts to him. But here there was a delivery of the deed, and the record of it is evidence of its delivery; which shows the donor intended it to have effect, and not to be revocable.

Mitchell, in reply, insisted that it was incumbent on the plaintiff to prove a demand and conversion. This was a conveyance of a present interest, and passed by delivery of the deed, subject to the use of the father for life. When the appellee married, she resided with her father, and it was a conjoint possession of the slave by her and her father. Being in her possession when she married, the slave vested *eo instanti* in the husband. How was he to reduce the slave into possession; living in the same house, he obtained the possession which his wife had. A note given to a *feme sole*, on her marriage vests in the husband. *Combs vs. Williams*, 15 *Mass. Rep.* 243. Where the interest vests during the coverture, the husband must sue alone. *Reeve's Dom. Rel. ch.* 4. There is no case at law where the husband has not a right to a legacy left to his wife. *Buckley vs. Collier,* 1 *Salk.* 114. 1 *Selw. N. P.* 246, 269. 3 *Selw. N. P.* 1159. *Ankerstein vs. Clarke,* 4 *T. R.* 617. No person could bring an action for the slave, as it was a gift *in presenti,* or a gift postponed until the death of the donor. If the first, then the slave must have been delivered to the appellee. A symbolical delivery will not do, it must be an actual delivery—an actual transmutation of possession. If the deed was not valid at common law, it was not under the act of assembly. 2 *Pow. on Mortg.* 1026, 1027. 1 *Pow. on Mortg.* 31, 32. If possession was delivered at the time of the gift, the interest vested in the husband; but if not delivered then, the gift was revocable by *Tucker.* A deed, purporting to be a deed of manumission, may be considered as a will. *Nan Mickell's* case, 14 *Johns. Rep.* 324. Supposing it to be a gift, it was a voluntary one, and void at common law, and under the statutes 13th and 27th *Elizabeth.* A voluntary conveyance, without consideration, is a fraud. Subsequent and prior creditors are placed precisely on the same footing. *Bayard vs. Hoffman,* 4 *Johns. Ch. Rep.* 450.

DORSEY, J. delivered the opinion of the Court. The only question brought before the court below in this case, connected with this appeal, was, whether the voluntary deed of gift of *Thomas Tucker* to the appellee, was void by the statutes 13th and 27th of *Elizabeth,* against fraudulent conveyances? We think the court decided correctly on the point submitted for their determination, according to the testimony in the cause. The deed of gift was duly executed, acknowledged and recorded, in 1796, and fourteen years afterwards the donor sold the negro, given by said deed, to the appellant. It is not shown that in 1796, or between that time and the year 1810, *Thomas Tucker* owed one cent to any human being. Upon what principle then can it be contended that his deed of gift was void under the 13th of *Elizabeth?* It is not a conveyance of lands, tenements or hereditaments, and therefore not a case embraced by the provisions of the statute of 27th of *Elizabeth.* But the court below, presuming from the manner in which the prayer was made to them, that their establishing the validity of this deed removed all impediments to the appellee's right of recovery, instructed the jury that he was entitled to recover. A new objection hath been raised to this instruction, to which the attention of the county court does not appear to have been called, viz. that there was no evidence offered to the jury from which they could find either an actual or an implied conversion. This the court think is a fatal objection to the opinion given by the court below, and to the recovery which has been had thereon, they therefore reverse their judgment.

JUDGMENT REVERSED,

And a *procedendo*, on motion of the Appellee's Counsel, was *refused.*

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Martin *vs.* Garrett.—June, 1826.

Debt on a single bill. Defendant pleaded general performance of *articles of agreement*, and plaintiff replied, by a *protestation*, that the defendant had not performed the articles of agreement, and issue was joined.

Held, that the pleadings were irregular; that in fact there was no issue joined in the cause. That to make an issue, as the plea affirmed, the performance of articles of agreement, there should have been in the replication an express negation of the plea. That a denial by way of protestation is no denial, and is ever unavoidable in the suit in which it is made, and in that suit the matters protested against are in effect admitted.

Held also, that if there was an issue joined in fact, it was an immaterial one, as it was joined on articles of agreement which did not appear in the pleadings, and the action was on a single bill, and was therefore an issue on a point different from the material allegation in the plaintiff's declaration.

A verdict having been rendered for the defendant in the inferior court, and judgment given on the verdict, it was reversed by the appellate court, and returned by *procedendo*, that the court below might award a *repleader*.

Appeal from *Montgomery* County Court. This was an action of debt; and the declaration stated that the defendant, (the present appellee,) on the 12th of August 1819, by his certain bill obligatory, acknowledged himself indebted to the plaintiff, (the appellant,) and promised to pay him the sum of £60 5 3½. The defendant pleaded, that he from the time of making the articles aforesaid, until the day of the impetration of the original writ of the plaintiff, well and truly hath observed, performed, paid, done and kept, all and singular the covenants, clauses, payments and agreements, in the said articles contained, which on his part were to be observed, performed, fulfilled, paid, done and kept, according to the form and effect of the said articles aforesaid; and this he is ready to verify," &c. The plaintiff replied, protesting that the plea of the defendant was insufficient, &c. and protesting also that the defendant had not performed, &c. and issue was joined.

At the trial, the plaintiff to support the issue on his part, read in evidence the following papers, admitted to have been executed by the defendant. 1. "*Honore Martin's* account against *William Garrett* to the 12th of August 1819, is £830 7 11, equal to ——. *William Garrett's* account against *Honore Martin* to the 12th of August 1819, is £770 1 7½, which leave a balance due *Honore Martin* of £60 5 3½; but there was an agreement made by *William Garrett*, with *Honore Martin*, to build a log granary, and also to build a shed to a house that *Honore Martin* had at *Medley's*, which *William Garrett* never completed—Therefore it is agreed by the parties, that what work *William Garrett* has done towards the building, according to his contract, should be paid for; which is to be settled by *Archibald Orme* and *James Gissen*, who are to make a statement of the building, and the work done by *William Garrett*, according to the account stated by the parties. The agreement for the building according to contract, was to be two hundred dollars, and what work was not done by *William Garrett* to be deducted out of the two hundred dollars." Signed and sealed by *Martin* and *Garrett*, the 13th of August 1819. 2. "It appears there exists a dispute concerning the moving of a house by *William Garrett*, which he charges five dollars for; and also a receipt of *Solomon Holland* for *William Garrett's* order, 18th July 1799, for £5 9 2½, which agree to leave to *Gassaway Perry* and *Brice Selby* to settle between us." Signed by *Martin* and *Garrett*. The defendant then prayed the court to instruct the jury, that upon the issue joined in the cause, the plaintiff was not entitled to recover. Which direction the Court, [*Kilgour*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Mitchell, for the Appellant, contended—1. That no issue was joined, and therefore there was a mistrial, and no judgment could be rendered upon the verdict given by the jury.

2. That upon the evidence stated in the bill of exceptions, the plaintiff was entitled to maintain this action of debt.

2. That the judge below erred in assuming, without proof, that the plaintiff executed the agreement; and also in directing the jury that upon the *issue joined* the plaintiff was not entitled to recover.

An agreement to refer matters in dispute will not preclude an action being brought. *Thompson vs. Charnock*, 8 *T. R.* 139. *Allegre vs. Maryland Insurance Company*, 6 *Harr. & Johns.* 413. *Mitchell vs. Harris*, 2 *Ves. jr.* 129. In an action of debt a sum less than that declared for may be recovered. 1 *Wheaton's Selw.* tit. *Debt*, 403. *M'Quillin vs. Cox*, 1 *H. Blk. Rep.* 249. *Lord vs. Houstoun*, 11 *East*, 62. *Walker vs. Witter*, 1 *Dougl.* 6. *Aylett vs. Lowe*, 2 *W. Blk. Rep.* 1221.

No Counsel appeared for the Appellee.

ARCHER, J. delivered the opinion of the Court. This is an action of debt on a single bill, as appears from the declaration, for the payment of £60 5 3½. The defendant pleaded general performance of *articles of agreement*, and the plaintiff replied by a *protestation* that the defendant hath not performed *the articles of agreement.*

The pleadings are altogether irregular. There is in fact no issue joined in the cause. There is the affirmance of the performance of articles of agreement, but there should have been an express negation of defendant's plea. A denial, by way of protestation, is no denial. It is ever unavailable in the particular suit in which it is adopted, and the allegations protested against are in effect admitted in the suit. 1 *Chitty on Plead.* 590. The tender of issue upon such a replication is therefore erroneous. There was in fact no issue for the jury to try.

But if there was an issue joined between the parties, it was an immaterial issue; for it is an issue joined on certain *articles* *of agreement,* which no where appear in the pleadings, and the suit is brought on a single bill. Now the finding of this issue, either for the plaintiff or defendant, determines no one question which has any relevancy to the action, and no judgment could be rendered on the verdict. Issue is taken, on a point different from the material allegation in the plaintiff's declaration, and although found by the verdict, the merits of the cause are left undetermined, and the court could not tell for whom to render judgment.

The judgment is reversed, that the county court may award a repleader, and that substantial justice may be done between the parties.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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HENCK *vs.* TODHUNTER, *et al.*—June, 1826.

It is not the practice in this state to require a warrant of attorney to counsel to appear, and the *English* rules of practice upon that subject are not applicable here.

A party may here appear in *propria persona,* or by attorney, and when the appearance of an attorney is entered on record, it is considered as done by the authority of the party; and whatever is done in the progress of the cause in which such appearance is entered, is esteemed as done by and as binding on him. Whether the attorney is or is not faithful to his trust, is a matter between him and the party.

Where, therefore, an attorney on the record applies for permission to have his appearance stricken out, the presumption is that he does it by the authority of his client; and the client is not thereby entitled to a continuance of his case, but it is to be proceeded in as if the appearance had not been stricken out.

Where the inferior court had permitted a plea to be stricken out, and it was ruled that the defendant answer anew, and then, at the instance of the defendant's counsel, the appearance of the counsel was stricken out, and no new plea was put in—*Held,* by the appellate court, that a judgment by default was properly entered against the defendant, as it was to be presumed that the leave to withdraw the plea was on condition that the defendant should plead anew, without delay, and that the rule then laid upon him to plead anew, was, virtually, a rule to plead *instanter.*

APPEAL from *Baltimore* County Court. *Assumpsit* on a promissory note for $1000, drawn by the defendant below, (now appellant,) on the 5th of January 1820, in favour of *Conrad Schultz,* or order, payable two years after date, and by

Schultz endorsed to the plaintiffs, (the appellees.) The writ issued on the 15th of February 1822, returnable on the fourth Monday in March following. At the return day of the writ, the defendant, (having been arrested,) appeared in court by *William Frick* his attorney; and on motion of the plaintiffs, the defendant was ruled to plead to the plaintiffs' declaration, which was filed at the time of issuing the writ. The defendant imparled until the next term to answer, and at that term he further imparled to the succeeding term for the same purpose. At which last mentioned term, viz. the fourth Monday in March 1823, the defendant again appeared by his said attorney, and pleaded *non assumpsit;* after which, at the same term, on the prayer of the defendant, by his attorney aforesaid, leave was granted to him to withdraw his plea, and it was accordingly withdrawn. On motion of the plaintiffs, it was then ruled by the court that the defendant answer anew to the declaration. Whereupon, on motion of the said *William Frick*, attorney of the defendant, it was ordered by the court that the appearance of said *Frick*, as said attorney, in the plea aforesaid, be stricken out, and the same was accordingly done. And the defendant, although solemnly called, did not come, &c. but made default; and on the prayer of the plaintiffs, the court assessed the damages of the plaintiffs to the sum of $1080 83, and rendered judgment in favour of the plaintiffs against the defendant, for the damages laid in the declaration, and costs of suit, with a memorandum that the damages were to be released on payment of the above sum, with interest, &c. From that judgment the defendant appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Martin, Stephen, Archer, and Dorsey, J.

Mayer, for the Appellant, contended—1. That no court is authorised to order the attorney's appearance to be struck out, unless with the consent of the party for whom he appeared. He cited 1 *Bac. Ab.* tit. *Attorney*, (C) 295. *Anon* 1 *Siderf.* 31, (S.) *Latuck ss. Pasherante*, 1 *Salk.* 86. 1 *Sellon's Pr.* 16, 17. *Bradley vs. Breach*, 2 *Keble*, 275.

2. If the court had authority to order the appearance of the attorney to be stricken out, the defendant should have been

served with a rule either to employ new counsel, or to appear in proper person.

3. No attorney is permitted to withdraw himself from the action without the consent of his client. If this is permitted, the party should have an opportunity of employing new counsel. Where the party appears by counsel, and the counsel afterwards withdraws from the cause, the party is not presumed to be in court after such withdrawal. *Darnall vs. Harrison,* 1 *Harr. & Johns.* 137.

4. No proper rule was laid for further plea after the withdrawal of the plea put in—the rule not assigning a time for putting in the new plea. The rule was radically defective, and is to be considered as no rule at all. 1 *Sellon's Pr.* 300. 2 *Harr. Ent.* 99. *Tidd's Appendix,* 193. *Lill. Ent.* 473.

5. The judgment by default was not authorised without a warrant of attorney appearing in the proceedings. 1 *Sellon's Pr.* 17. *Jacobs' L. D.* tit. *Judgment,* 559.

Mitchell, for the Appellees. 1. If the appellant's counsel is right, then, wherever the defendant and his attorney combine, he may withdraw himself from the cause at the trial term, and by that means have a new rule laid on him to employ new counsel, by which the trial would be delayed, &c.

2. A warrant of attorney is not necessary in this state. It is only a stamp regulation which makes it necessary in *England.* It is not necessary that it should be entered on record. 1 *Com. Dig.* tit. *Amendment,* (E 2,) 454. *M'Mechen vs. The Mayor, &c.* 2 *Harr. & Johns.* 41.

3. The defendant is the person who appears, and is discharged from the custody of the sheriff. He is presumed to be always in court, and there is nothing to prevent his attorney from withdrawing himself from the action. Where an attorney takes upon himself to appear, &c. the judgment is not to be set aside. The plaintiff, who is in no default, is not to suffer. 1 *Bac. Ab.* tit. *Attorney,* (C,) 296. The client's remedy is against his attorney, if he has deserted his cause without leave, or on improper grounds.

Buchanan, Ch. J. delivered the opinion of the court. It is not the practice in this state to require a warrant of attorney to authorise the appearance of a defendant by attorney; the rules of practice, therefore, in *England*, in relation to that subject, are not applicable to the proceedings of the courts of this state.

But the party may, by the law and practice of the courts of this state, appear either in *propria persona*, or by attorney; and whenever the appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party; and whatever is done in the progress of the cause by such attorney, is considered as done by the party, and binding upon him. And whether the attorney is faithful to his trust or not, is a matter between him and the party, his client, to whom he is responsible for the faithful discharge of his duty. When, therefore, an attorney on the record applies for permission to cause his name to be stricken out, it is presumed to be done at the instance and by the authority of the party for whom his appearance has been entered. But it will never be permitted to a party, or his attorney, to obtain a continuance of a cause beyond the time allowed him by law, by striking out the attorney's appearance at the term at which the cause stands for trial; otherwise, by collusion between client and attorney, the trial of a cause might be delayed without limit. Hence, though the court will, on application, permit the attorney's name to be stricken out, considering him as acting on that very application as the attorney, and at the instance of the party, yet it will not be done to the prejudice of the other party, and the cause will be made to progress as if the appearance had not been stricken out.

In this case the cause stood regularly for trial; and it must be understood that the permission given by the court to the defendant's counsel to withdraw his plea, was only to give way to another plea without delay, and that the rule then laid to plead over was virtually a rule to plead *instanter*, otherwise it would have worked a continuance for a cause not justified by law.

JUDGMENT AFFIRMED.

L. & I. RIGGIN *vs.* THE PATAPSCO INSURANCE COMPANY.—June, 1826.

On a marine policy of insurance against particular risks, the underwriter is supposed tacitly to assent to all reasonable efforts which the master may find it necessary to make for the safety of the property insured, and its transportation to the port of destination, and to authorise him to avoid urgent danger, whether such danger be from a peril insured against or not.

There is no distinction between cases of physical and moral necessity as justifications for departure from the course of the voyage.

In every contract of marine insurance, it is the obligation of the assured to provide a master of competent skill and prudence; and if in a change of the course of the voyage a loss happen, which may be justly attributed to the master's not being of that character, the insurance is discharged.

The mere apprehension of danger, not founded upon reasonable evidence, does not justify a deviation. The peril apprehended must be such as, if encountered, loss or serious injury is the necessary consequence; the danger must be imminent and obvious, not problematical or contingent—

In an action of *covenant* on a policy of insurance, against the usual risks, on a vessel "from *Baltimore* to *St. Barts*, and at and from thence to *St. Martha* on the *Spanish Main*, with the privilege of returning to *St. Barts*, or using three other ports on the *Main*, or in the *West Indies*," dated the 5th of May 1821—it appeared that the vessel sailed the 5th May, 1821, and arrived at *St. Barts* the 28th; that the captain and supercargo were there informed that *St. Martha*, which at the time of the vessel's leaving *Baltimore* was in the possession of the *Patriots*, had fallen into the hands of the *Royalist Spaniards*; and having learned that the same port, on a former occasion, having been in the possession of the *Patriots*, had fallen into that of the *Royalists*, who had, by keeping the *Patriot* flag flying, decoyed vessels into port, and confiscated them; and learning at *St. Barts*, that *Marguarita*, a *West India Island*, was the best place to acquire information as to the situation of *St. Martha*, proceeded there. On getting there, learning that *St. Martha* was still in the possession of the *Patriots*, the vessel proceeded without loss of time to that place, and in the direct course of the voyage there, was lost by the perils of the sea. *Marguarita* was not in the usual tract of a voyage from *St. Barts* to *St. Martha.*

Held, that the going to *Marguarita* was a deviation which discharged the underwriters. That the danger apprehended by the captain of condemnation at *St. Martha*, was not so *obvious* or *imminent*, as to excuse the departure. That as it was not alleged, that on the occasion when condemnations were proved to have been made at that port before, *American* or neutral vessels had been condemned, such acts of outrage could not be imputed to the agents of a civilized nation.

Held also, that as there appeared to have been another port in the direct voyage from *St. Barts* to *St. Martha*, at which the master might have obtained the information as to the condition of *St. Martha*, it was his duty to have known that fact, and to have gone to such port for information, if the danger of condemnation at *St. Martha* had been obvious and imminent.

Where there is no evidence before the jury of a fact, or the evidence offered is so vague and indefinite that no rational inference of such fact can be deduced from it, the court ought to direct the jury that it is not competent for them to find such fact.

Where the facts are admitted, the question of deviation is one of law.

There is no difference between a statement in a bill of exceptions, that certain facts were *proved*, and that evidence *was offered of them*.

APPEAL from *Baltimore* County Court. This was an action of covenant, brought by the insured, (the appellants,) against the insurers, (the appellees,) upon a policy of insurance on the schooner *Two Brothers*, at and from *Baltimore* to *St. Bartholomews*, &c. for a total loss by the perils of the sea. The defendants pleaded *non infregit conventionem*, and issue was joined.

At the trial the plaintiffs gave in evidence the policy of insurance declared upon, which was duly proved, dated the 5th of May 1821, in which it is set forth "that the *Patapsco Insurance Company* have insured, and hereby do insure, *L. & I. Riggin*, as well in their own name as in the name or names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in the whole, lost or not lost, at and from *Baltimore* to *St. Barts*, and at and from thence to *St. Martha*, on the *Spanish Main*, with the privilege of returning to *St. Barts*, or using three other ports on the *Main*, or in the *West Indies*, and at and from any of them back to *Baltimore*, two thousand dollars, upon the body, tackle, apparel, and other furniture of the schooner, called *Two Brothers*, whereof is master for the present voyage, —— *Cochran*, or whoever else shall go for master in the said vessel. Beginning the adventure upon the said vessel, tackle, apparel and furniture, at and from *Baltimore* aforesaid, and continuing the same until the said vessel be arrived at the ports aforesaid, and until she be moored there twenty-four hours in good safety: the said vessel, her tackle, apparel and furniture, for so much as concerns this insurance, by agreement between the insured and the insurers, are and shall be valued at ———. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The adventures and perils which we, the insurers, are contented to bear and take upon us in this voyage are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, unlawful arrests, restraints and detainments, of all kings, princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and all such other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said vessel, or any part thereof, as insurers are legally accountable for; warranted, nevertheless, by the insured, free from any charge, damage or loss, which may arise in consequence of a seizure or detention of the said schooner, or of the goods laden or to be laden therein, by reason or on account of any illicit or prohibited trade, or trade in articles contraband of war," &c. The plaintiffs further proved, that at the time the insurance was effected, and at the time of the loss hereinafter mentioned, the said vessel was the property of the plaintiffs. That said vessel being tight, staunch and strong, sailed on the voyage insured, on the fifth day of May 1821, and arrived at *St. Barts* on the 28th day of the same month; that the captain and supercargo were there informed, and had good reason to apprehend, that *St. Martha*, which at the time of the sailing from *Baltimore*, was in the possession of the *Patriots*, had fallen into the hands of the *Royalist Spaniards*, and having learned that the same port on a former occasion having been in possession of the *Patriots*, had fallen into the hands of the *Royalists*, who had, by keeping the *Patriot* flag flying, decoyed vessels into port, and seized, detained and confiscated them; and apprehending a similar fate, and learning at *St. Barts* that *Marguarita*, a *West India Island*, was the best and safest port or place at which to acquire information relative to the situation of *St. Martha*, proceeded there; and having learned there that *St. Martha* was still in the possession of the *Patriots*, without loss of time proceeded directly for that port, and in the direct course of her voyage, was wholly lost by the perils of the sea. The defendants, on their part, offered evidence that the said schooner *Two Brothers*, on her arrival at *St. Bartholemews*, in the prosecution of the voyage insured, learnt by rumours there prevailing, that *St. Martha* was in the possession of the *Royalists* forces of the government of *Spain*, and that it would be unsafe to proceed there, as by the colonial laws of *Spain* all intercourse was interdicted between foreigners and her colonies. And the defendants further offered evidence, that *Marguarita* was at the distance of 600 miles from *St. Martha*, and was much out of the usual track of a voyage from *St. Barts* to *St. Martha*, and was never pursued by a vessel, having the aforesaid port in view as her immediate destination; that the island of *Curracoa* is in the direct route of the voyage from *St. Barts* to *St. Martha*, and that it is more than one third less in the actual distance than *Marguarita*, and about 300 miles distant from *St. Martha*; that *Curracoa* was an open port, free for the reception of *Spanish* and *Colombian* vessels of war, and for the vessels of all other nations, and that constant intercourse was kept up between *Curracoa* and *St. Martha*, and that information in relation to the last mentioned port, would be heard at *Curracoa*, in the course of three or four days, that being the usual length of the voyage between those places, and that *Curracoa* was resorted to by neutral vessels for intelligence as to the state of the *Spanish Main*. That *Curracoa* is a place of deposit or *entre port* for large quantities of merchandize which are intended to be carried to the different ports on the *Spanish Main*, and which are from time to time, placed there, and removed according to the state of the market and the situation of the ports on the *Main*, whether in the possession of the royalists or independents, and that these facts in relation to *Curracoa*, were well known in *Baltimore*, previous to, and at the time of, the sailing of the said vessel on the voyage insured. And the defendants further offered evidence, that the said vessel sailed from the port of *St Barts* for *Marguarita*, having no other information of the actual state of *St. Martha* than what they received in the general rumour which prevailed at *St. Barts*, and that it was well known at *St. Barts* that *Curracoa* was the nearest place to *St. Martha*, where correct information was at all times to be obtained, of the state and condition of the government at *St. Martha*. And the defendant also offered evidence that the said vessel remained at *Marguarita* for the period of four days after her arrival, having been detained by the officers of the government of that place, who kept the register of said vessel till that time. And the defendants also offered evidence, that *St. Martha* had not been in the possession of the *Royalists*, and that the information received at *St. Barts* on that subject, was wholly unfounded. That the vessel sailed from the port of *Marguarita* on a voyage to the port of *Maracaybo*, another port on the *Spanish Main*, having altogether abandoned the voyage to *St. Martha*, and that in the prosecution of the voyage to *Maracaybo* she was lost on the island of *Little Curracoa*, which lies between the ports of *Marguarita* and those of *Maracaybo* and *St. Martha*, and that the said last mentioned island is in the direct route to both of the said ports. The defendants further offered evidence, that the said vessel received on board, at the port of *Baltimore*, previous to her sailing on the voyage insured, three or more military officers in the service of the *Colombian Republic*, one of the independent governments of *South America*, for the purpose of transporting them to *St. Martha*, to unite with the military forces of said republic, in the war then carrying on between *Spain* and the said *Republic*, and that the said officers remained on board said vessel at the time of her loss on the island of *Little Curracoa*. And the plaintiffs then offered evidence to disprove the whole of the facts stated in the preceding case of the defendants; and moved the court to direct the jury, that if they should believe, that upon the arrival of the vessel insured at *St. Barts*, it was generally reported that *Santa Martha* was in possession of the *Royalists*, and that the master and supercargo were informed at *St. Barts*, and verily believed, that M*arguarita* was the best and nearest place to obtain information relative to the situation of *Santa* M*artha*, and that the master of said vessel, in the exercise of an honest and sound discretion, went to M*arguarita* for information, that then his proceeding there was no deviation, and that the plaintiffs were entitled to recover for a total loss. Which instruction the Court, [*Archer* Ch. J. and *Ward*, A. J.] refused to give. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before **Buchanan**, Ch. J. and **Earle**, **Stephen**, and **Dorsey**, J.

Meredith, for the Appellants. The question is, whether under the circumstances stated in the bill of exceptions the captain of the vessel insured was guilty of such a deviation in proceeding to *Marguarita*, as will discharge the insurers from responsibility for the loss that subsequently occurred? The negative of this proposition will be contended for on the part of the appellants. To exonerate the insurers by a deviation, it must be a voluntary departure from the voyage insured. A departure, proceeding from necessity, is excusable. The deviation in this case, was a justifiable one, and could not affect the insurance. Where the deviation proceeds from a fear of danger, arising from well grounded information, it is excusable. Where the vessel, from stress of weather, is driven into a port out of the course of the voyage insured, or by mutiny of the crew, or in avoiding capture, &c. the insurance is not affected. To show that this was a justifiable deviation, he cited *Reade & Jephson vs. Commercial Insurance Company*, 3 *Johns. Rep.* 352. *Phillips on Ins.* 192, 194, 195. *Oliver vs. Maryland Insurance Company*, 7 *Cranch*, 493. *Whitney vs. Hayden*, 13 *Mass. Rep.* 172. *Patrick vs. Ludlow*, 3 *Johns. Cas.* 10. *Smith vs. United Insurance Company*, 1 *Johns. Rep.* 249. *Lee vs. Gray*, 7 *Mass. Rep.* 349. *Hadkinson vs. Robinson*, 3 *Bos. & Pull.* 388. 1 *Park*, 262. *Enderby vs. Fletcher*, at *N. P.* 1780, Per Lord *Mansfield*. *Graham vs Commercial Insurance Company*, 11 *Johns. Rep.* 352. 1 *Marsh.* 205. *The Santissima Trinidad*, 7 *Wheat.* 283. Even if the peril was not insured against yet the deviation was justifiable. A policy of insurance is to be construed for the advantage of trade —for the benefit of the insured, and according to the intention of the parties. 1 *Marsh.* 304, 204. To show that the deviation was justifiable, although the risk against which it was the intention to guard was not insured, he cited *Lubbock vs. Rowcroft*, 5 *Esp. Rep.* 50. *Saltus vs. United Insurance Company*, 15 *Johns. Rep.* 526. *Green vs. Elmslie, Peake's N. P.* 212. *Scott vs. Thompson*, 4 *Bos. & Pull.* 181. *Robinson vs. Marine Insurance Company*, 2 *Johns. Rep.* 89. *Phill.*

on Ins. 214. *United States vs. Palmer*, 3 *Wheat.* 610, 636. *The Divina Pastora*, 4 *Wheat.* 52. *Richardson vs. Maine Insurance Company*, 6 *Mass. Rep.* 105. *Earle vs. Rowcroft*, 8 *East.* 126. *Barker vs. Blakes*, 9 *East*, 283. *Bird vs. Appleton*, 8 *T. R.* 562. *Vasse vs. Ball*, 2 *Dall.* 270. 1 *Marsh.* 439, 449, 415, 434, 436, 203. *Marine Insurance Company vs. Tucker*, 3 *Cranch*, 357.

Mayer, for the Appellees. There is no difference between a statement in a bill of exceptions, that certain facts were proved, and that they were offered in evidence. Where a vessel goes out of the course of the voyage insured in order to avoid a peril not insured against, the insurance is void, and the insurers are discharged. *Breed vs. Eaton*, 10 *Mass. Rep.* 21. *Roget vs. Thurston*, 2 *Johns. Cas.* 248. *O'Reilly vs. The Royal Exchange Insurance Company*, 4 *Campb.* 248. *Parkin vs. Tunno*, 11 *East*, 22. The privilege of deviation is a limited one. It was for the jury to determine whether it was a discreet apprehension of the captain so as to induce him to deviate from the direct voyage; and that if it was necessary for him to deviate, whether he did go to the nearest port to obtain the information required. *Oliver vs. Maryland Insurance Company*, 7 *Cranch*, 493. *Phillips on Ins.* 192, 193. 1 *Marsh.* 195, 204. *Park*, 264. The deviation must be for the benefit of the parties concerned. 1 *Marsh.* 205. *Phill. on Ins.* 235. *Richardson vs. Maine Insurance Company*, 6 *Mass. Rep.* 121. *Smith vs. Universal Insurance Company*, 6 *Wheat.* 176. *Polk vs. Fitzgerald*, *Willes*, 641. In March 1822 the independence of *Colombia* was recognized by the government of the *U. S.* 22 *Niles's Reg.* 147. The *U. S.* recognized the existence of a civil war in that country. *The Santissima Trinidad*, 7 *Wheat.* 337. *United States vs. Palmer*, 3 *Wheat.* 610. *The Divina Pastora*, 4 *Wheat.* 52.

Purviance, on the same side. Until the mother country acknowledges the independence of its province, it remains as a part of the mother country, no matter whether there be a war carried on between them or not. Trade with such province, if permitted by the mother country, must be carried on as if it were not an independent country; but if the intercourse is interdicted by the mother country, then a trade with the colony would be an illicit one. There is a distinction between a warranty, and a violation from necessity of any part of the policy containing a mere statement. The warranty ties up the insured to a performance to its letter. 1 *Marsh* 346, 349. If the warranty is violated, the policy is at an end. In the case of a deviation if the danger consists of being captured on entering a port, it would be allowed if there was no warranty. If to avoid the peril is for the benefit of all the parties, it is allowable. But if it proceeds from a peril not insured against, though it be a matter of prudence for the benefit of the insured, yet the assurer is not answerable in case of a loss. The violation of the laws of the country of the assured and assurer absolves the insurance; but the violation of the laws of a foreign country does not vitiate the policy. *Livingston & Gilchrist vs. Maryland Insurance Company*, 7 *Cranch*, 540. *Rose vs. Himely*, 4 *Cranch*, 272. *Gelston vs. Hoyt*, 3 *Wheat*. 324. *United States vs. Palmer*, *Ibid* 634. The prayer to the court in the bill of exceptions was grounded on a part only of the evidence. What difference was it whether *St. Martha* was in possession of the *Royalists* or of the *Patriots?* There might be a difference if the *Royalists* would pursue the same line of conduct which they had pursued on a former occasion, but that, by the form of the prayer, was thrown out of the view of the jury.

Mitchell, in reply, referred to *Phill. on Ins.* 191, 192, 193, 195, 196, 228, 148, 149, 150, 8, 276, 277, 296, 234, 293, 294, 216, 223. *Stocker vs. Harris*, 3 *Mass. Rep.* 417. *Lee vs. Gray*, 7 *Mass. Rep.* 349. *Schmidt vs. United Insurance Company*, 1 *Johns. Rep.* 262. 1 *Marsh.* 207, 346, 270. 4 *Wheat. (Appendix, note 2.)* *United States vs. Palmer*, 3 *Wheat.* 610. *The Santissima Trinidad*, 7 *Wheat*. 337. *Oliver vs. Maryland Insurance Company*, 7 *Cranch*, 494, 495, 496. *Vattel*, B 3, *ch.* 18, *s.* 295, 296, page 426, 427. 2 *Phill. Evid.* 60, *(note.)* 1 *Marsh.* 346, *(note* 55,*)* 78, *(note 2.)* *Earle vs. Rowcroft*, 8 *East*, 126. *Vasse vs. Ball*, 2 *Dall.* 274. *Church vs. Hubbart*, 2 *Cranch*, 187, 232, 234. *Bird vs. Appleton*, 8 *T. R.* 562. *The Schooner Rapid*, 1 *Gall.*

Rep. 303. *Scott vs. Thompson,* 4 *Bos. & Pull.* 181. *Reade & Jephson vs. Commercial Insurance Company,* 3 *Johns. Rep.* 352. *The Ship Argo,* 1 *Gall. Rep.* 157. *O'Reilly vs. The Royal Exchange Ins. Co.* 4 *Camp.* 248; and *Johnston vs. Ludlow,* 1 *Caine's Cas.* Appen. XXIX.

DORSEY, J. delivered the opinion of the Court. The right to the appellants to recover in this action, seems to have been resisted in the court below, simply on the ground that the sailing of the schooner *Two Brothers* from *St Barts,* to *Marguarita,* under the circumstances of the case, was a deviation by which the underwriters were discharged from all liability on the policy. But the appellees here contend, that the judgment rendered is correct for various reasons. *First.* They insist that every deviation to avoid a peril not insured against absolves the assurers. To examine this point independently of decisions on the subject, the court think it stands relieved from all difficulty or doubt. In construing a policy of insurance, the court should give it a fair and liberal interpretation, such as, under all the circumstances of the case, appears most consonant to the intention of the parties at the time the contract was formed. The design of the assured, being to provide for themselves an indemnity against loss, from which the insurers engage to protect them, such a construction should be placed on their compact as, according to the understanding of the parties and nature of the transaction, will effectuate that object. Mercantile negociations should never depend on subtleties and niceties, but upon rules founded on common sense and justice, a knowledge of which would therefore be readily acquired by the community at large. Policies of insurance may be considered either as universal, embracing all manner of risks, or special, being confined to one or more specified perils. On the latter description of policies only, can the question now under consideration ever arise. As to all risks, not insured against, the owner becomes his own underwriter; when an insurer assumes a responsibility for all losses, for example, arising from sea risks only, can it be presumed to be the understanding or agreement of the parties to the policy, that the insured relinquished all right to escape capture from pirates, or elude other imminent peril, by flying for protection to a neighbouring port out of the usual course of the voyage? If such be the operation of a contract of insurance, not universal, instead of providing for the insured an indemnity against loss, it serves but to paralise his efforts for the safety of his property, and to impose on him new duties and restrictions which enhance his dangers. "A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage." How can that digression from the course of the voyage be said to be "without necessity or reasonable cause," which is made to avoid an imminent peril of capture, or other disaster necessarily resulting in the entire loss of the subject matter of insurance? If not, then such a departure being no deviation, is justifiable, and impairs not the liabilities of the underwriters. Suppose the common case of a general ship, where the cargo is owned by many different persons, each of whom insure against separate risks; upon the occurrence of a peril, insured against by any one owner, the captain becomes the joint agent of such owner and his underwriter, and is in duty bound to avoid the danger even by a digression from the course of the voyage; and yet in such a case, if the doctrine contended for be correct, all the underwriters, upon other parts of the cargo, would be absolved from their engagements—In manifest violation of the intentions of all the parties, and contrary to every idea of common sense and justice. The court think that the insurer must be presumed to be acquainted with the usages and accidents to which the property insured may be subjected in the course of the voyage; that they are contemplated by him at the time of his contract, enter into and become a part of it; and that although he is only answerable for losses flowing *immediately* from the perils against which he insures, yet that viewing the captain as the agent of the owner, he tacitly assents to all reasonable efforts, which he may make for the safety of the property insured, and its transportation to the port of destination; and consequently authorises the usual means of avoiding urgent danger, whether it be from a peril insured against or not.

This being the view which we have taken of this point in the cause, independently of all adjudications on the subject, let us examine how far they should prompt us to a change of opinion. Between cases of physical and moral necessity as justifications for departure from the course of the voyage, the books make no distinction, and in reason and on principle there is none. In support of the principle for which they contend, the counsel for the appellees have referred to three cases; one of which is *Breed & others vs. Eaton*, 10 *Mass. Rep.* 21. The policy was signed at *Boston*, in December 1810, on a voyage from *Liverpool* to *Savannah;* the vessel arrived off the port of destination on the 25th of February 1811, but being informed of the non-intercourse law passed by the congress of the *United States*, the captain, afraid to enter, and apprehending seizure and confiscation, to avoid it sailed to *Amelia Island*, to wait until he might lawfully return to *Savannah*. The underwriters being sued on this policy for a subsequent loss, their counsel insisted that they were discharged by the deviation, in going to *Amelia Island*, to avoid a risk not covered by the contract of insurance; and also that the policy became void in consequence of the non-intercourse law of the *United States*; "and of this opinion, (says the reporter,) were the court." Of what opinion? Whether that the deviation avoided the policy, or that it became void under the non-intercourse law of the *United States*, we are left to conjecture. But from the manner in which the last position was presented to the court, being deemed too plain to require either argument or authority to support it, and from the promptness and brevity with which their judgment was announced as soon as the last point in the cause was started, it affords a very strong presumption, that upon that only did they bottom their decision. It was not the habit of that enlightened tribunal to decide in a way so summary and laconic, so grave and important a question as that discussed on the principle of deviation, and on which contradictory determinations had taken place. We are aware, however, that in *Phillips on Insurance*, 211, this case is classed as though it turned on the point of deviation. The other two cases are *Roget vs. Thurston*, 2 *Johns. Cases*, 248, and *O'Reilly vs. The Royal Assurance Company*, 4 *Campbell's Nisi Prius Rep.* 246, both of which do sanction this novel and technical distinction relied on by the appellees. But *Roget vs. Thurston* is in fact overruled by a subsequent decision of the same tribunal, in which Chief Justice *Kent*, with Judges *Tompkins*, *Spencer* and *Thompson*, concurring, decides, that "a deviation from necessity will excuse the assured, in case of an assurance against any particular risk, as well as in case of a general insurance. There is not probably any exception, to be met with, to the application of the general principle, that if the vessel departs from the usual course of the voyage from necessity, and departs no further than that necessity requires, the voyage will still be protected by the policy." Vide *Robinson and Robinson vs. The Marine Insurance Company of New York*, 2 *Johns. Rep.* 89. In this case, the insurance being against "sea risks only," and a digression *quia timet* a peril not insured against, the court adjudged it no deviation. The appellees then can only sustain their position by the single *nisi prius* decision of Chief Justice *Gibbs*, in 4 *Campbell*, in opposition to which is the positive decision of Lord *Kenyon* in *Green vs. Elmslie*, *Peake N. P.* 212, which is approved of and adopted by Lord *Ellenborough* in *Livie vs. Janson*, 12 *East*, 653; and the deliberate opinion of the court of common pleas, delivered by Chief Justice *Mansfield*, after full argument, in *Scott vs. Thompson*, 4 *Bos. & Pull.* 181. In *Marshall on Insurance*, 204, it is stated, that "necessity will justify a deviation though it proceed from a cause not insured against." And the same principle is supported by *Phillips on Insurance*, 214. The weight of authorities, this court conceive, is decidedly in favour of the views they have taken of the case at bar; and in all questions of this nature we apprehend the doctrine laid down in *Stocker, et al. vs. Harris*, 3 *Mass. Rep.* 417, stands free from objection, that "the captain is the common agent of the concerned, and it is his duty to manage their distinct and separate, as well as their joint interests, according to his best judgment; and whatever is fairly done with this purpose, is within the course of the voyage; and delays, occasioned by such events, are accidents to which the insurers are *accidentally*, if not directly subjected." "Fairly done," being understood to mean, done with good intentions, and upon reasonable grounds. But admitting the law to be otherwise, there is nothing in the bill of exceptions to show that the peril sought to be avoided was one excepted out of the policy. It does not even appear that the *Two Brothers* had any cargo on board, or that there could have been the most remote cause or apprehension of danger, "by reason or on account of any illicit or prohibited trade, or trade in articles contraband of war."

The appellees' next object, that the appellants having prayed an hypothetical instruction from the court, that they were entitled to recover if the jury believed certain enumerated facts; the effect of granting such prayer would be, to withdraw from the hands of the jury, the finding of all other facts than those specified; and would in truth be a direction, that if the jury should find the facts enumerated to be true, although they might disbelieve every other fact on which testimony had been offered, yet that the plaintiffs are entitled to recover. If such would be the operation of the instruction prayed for, it surely cannot be contended, that its refusal is matter of error, as all evidence of peril, or apprehension of peril, is excluded from the consideration of the jury, it not being one of the enumerated facts, on the finding of which their verdict is made exclusively to rest. The departure from the course of the voyage being then without apology or justification, the law affixes to it the character and consequences of deviation. Whether this be the true construction of the appellants' prayer, is not clear of doubt, and we deem it unnecessary to express any opinion on the subject.

The appellees also insist, that the testimony, offered in this cause, does not disclose any justification for the sailing of the schooner from *St. Barts* to *Marguarita*, and that on account of this deviation they are discharged from their policy. And in this we concur with them in opinion. In every contract of marine insurance the law imposes an obligation on the assured to provide a master of competent skill, prudence and discretion, to navigate the vessel; and if in a change of the course of the voyage a loss happen, which may be justly imputed to his not having provided a master of that character, the underwriters are not responsible. The mere apprehension of danger, unless founded on reasonable evidence, does not justify deviation. The court, and not the jury, are the judges whether the deviation be justifiable. *Oliver vs. Maryland Insurance Company*, 7 *Cranch*, 493, 4, 5; and *Patrick vs. Ludlow*, 3 *Johns. Cas.* 13. The peril apprehended must be such, that if encountered, loss or serious injury is the necessary consequence. The danger must be imminent and obvious, not problematical or contingent. Apply these principles to the evidence offered in the case at bar. Upon their arrival at *St. Barts*, the captain and supercargo "are informed, and had good reason to apprehend, that *St. Martha*, which at the time of the sailing from *Baltimore* was in possession of the *Patriots*, had fallen into the hands of the *Royalists*, who had, by keeping the *Patriot* flag flying, decoyed vessels into port, and seized, detained and confiscated them." Do these facts constitute an "obvious" or "imminent" danger? Is it alleged that on such former occasion *American*, or neutral vessels, were decoyed into port, seized and confiscated? Not a word of the kind. And this court are not permitted by mere implication, in the absence of all proof, to impute to the agents of a sovereign and christian nation such acts of lawless outrage and treacherous rapine. The hoisting of the *Patriot* flag by the captors of *St. Martha* can only be viewed as a *ruse de guerre* to operate on the vessels of the *Patriots*, not of neutrals. There appears, therefore, to have been no cause for the apprehension of such danger as would justify the sailing from *St. Barts* to *Marguarita.* Even suppose that neutral vessels had shared the same fate at *St. Martha*, on the occasion alluded to, with those of the *Patriots;* there is no evidence to show, that the recaptor of *St. Martha* was the same perfidious *Royalist* robber, into whose hands it had formerly fallen. And there is a total absence of testimony on which to ground an inference, that a similar system of plunder had been practised in recaptured ports by other *Royalist* commanders. On these grounds the court below were right in refusing to grant the plaintiffs' prayer that they were entitled to recover.

Their opinion, it is apprehended, may be supported on another ground. "The circumstance that a deviation takes place through the mistake or negligence of the captain, does not prevent its discharging the underwriters, since his mistakes and negligence are at the risk of the assured." See *Phil. Ins.* 223, and *Phyn and others vs. The Royal Exchange Insurance Co.* 7 *T. R.* 501. The captain is bound to know, as far as the ordinary means of information can afford such knowledge, the various ports in the course of his voyage, as well as regards their locality, as the general nature of their trade, and the relief and assistance he may expect to obtain, should he be compelled to visit them on account of any emergency arising in the prosecution of the voyage. A failure, on the part of the captain, to possess such information, is a violation of the implied engagement always imposed on the assured, that the vessels, in relation to which the insurance may be effected, is navigated by an officer of competent skill and judgment for the performance of the voyage. According to the testimony offered by the defendants, *Curracoa* is in the direct route of the voyage from *St. Barts* to *St. Martha*; is an open port, free for the reception of *Spanish* and *Colombian* vessels of war, and for the vessels of all other nations, and that constant intercourse is kept up between *Curracoa* and *St. Martha*; and that information, in relation to the last mentioned port, would be heard at *Curracoa*, in the course of three or four days, that being the usual length of the voyage between those places; and that *Curracoa* was resorted to by neutrals for intelligence as to the state of the *Spanish Main*. That *Curracoa* is a place of deposit or *entrepot* for large quantities of merchandize which are intended to be carried to the different ports on the *Spanish Main*, and which are from time to time placed there and removed according to the state of the market, and the situation of the ports on the *Main*, whether in possession of the *Royalists* or *Independents;* and that these facts, in relation to *Curracoa*, were well known in *Baltimore*, previous to and at the time of the sailing of said vessel on the voyage insured; and that it was well known at *St. Barts* that *Curracoa* was the nearest place to *St. Martha*, where correct information was at all times to be obtained of the state and condition of the government of *St. Martha*. That *Marguarita* is six hundred miles from *St. Martha*, whilst *Curracoa* is but three hundred; and that *Marguarita* is by one third more distant from *St. Barts* than *Curracoa*. That *Marguarita* is much out of the usual track of a voyage from *St. Barts* to *St. Martha*, and was never pursued by a vessel having *St. Martha* in view as her port of immediate destination. In justification of the conduct of the captain, without proving that *Marguarita* was a port of more convenient access than *Curracoa*, was likely to possess the means of giving the information sought for, or for a like purpose was ever visited by any vessel on any voyage, it is proved, that the captain, "learning at *St. Barts* that *Marguarita*, a *West India* island, was the best and safest port or place at which to acquire information relative to the situation of *St. Martha*, proceeded there." How, or from what source the captain gained this intelligence does not appear. Of the facts detailed in relation to *Curracoa* he was bound to have had knowledge. If so, can it be doubted, that it was his duty to have sought the intelligence he desired at the port of *Curracoa*, the nearest and most convenient port, and that by proceeding to *Marguarita*, he committed a deviation which discharged the underwriters.

But the court were justified on another ground in refusing the plaintiffs' prayer. They could only grant it, provided that from the whole testimony offered in the case, the jury were warranted in finding the facts specially enumerated therein, and all other facts necessary to support the action; notwithstanding it be admitted that all the evidence offered by the defendants is true, (except so far as the same may be contradicted by the finding of the specific facts contained in the prayer,) no matter how strong may be the contradictory testimony produced by the plaintiffs. Upon any other principle the court would have transcended the limits prescribed to their powers, and invaded the undeniable and exclusive prerogative of the jury, viz. the right of deciding on all matters of fact, as to which contradictory evidence may be adduced. What is the instruction prayed? That the court direct the jury, "that if they should believe, that upon the arrival of the vessel insured, at *St. Barts*, it was generally reported that *St. Martha* was in possession of the *Royalists*, and that the master and supercargo were informed at *St. Barts*, and verily believed, that *Marguarita* was the best and nearest place to obtain information relative to the situation of *St. Martha*, and that the master of said vessel, in the exercise of an honest and sound discretion, went to *Marguarita* for information, that proceeding thereto was no deviation, and that the plaintiffs were entitled to recover for a total loss." How could the court authorise the jury to find the fact, that M*arguarita* was the ***nearest*** port to obtain information relative to the situation of *St.* M*artha*, without one particle of testimony, on the part of the plaintiffs, to establish that fact; and in opposition to its conclusive refutation by positive proof adduced by the defendants. We conceive it to be the peculiar duty of courts of original jurisdiction, imposed on them for the wisest and best purposes, when applied to, in cases where either no testimony is offered of a fact, or the proof is so vague and indefinite, that by no rational inference can the fact attempted to be proved be deduced, to instruct the jury, that from the testimony offered, it is not competent for them to find such fact. The inconsistency of the court, therefore, would have been most conspicuous, had they by express instruction encouraged the jury to find M*arguarita* the *nearest* port, not only without proof, but against that of the most clear and unequivocal character.

The court were right in rejecting the prayer for another reason. The facts being admitted, the question of deviation is a matter of law for the decision of the court. Considering, then, the testimony in the cause in the way in which it is before stated, the court were bound to receive it in reference to this prayer. Is it possible that any court of judicature, (let the intentions of the captain have been never so honest,) would instruct a jury, that under the circumstances of this case, whilst impelled by no imminent peril, but proceeding merely to enquire into the truth of a public rumour, they were authorised to find, that in going to M*arguarita*, instead of *Curracoa*, he acted in the exercise of "a sound discretion?" We think not. His conduct must be imputed to that gross ignorance and want of judgment, which discharges the underwriters.

Much stress was laid, in the argument, on the statement in the bill of exceptions, that the plaintiffs "proved" such and such facts. We receive it as meaning nothing more, than that he offered evidence thereof.

Buchanan, Ch. J. dissented.

JUDGMENT AFFIRMED.

PRICE & NISBET *vs.* BIGHAM'S EX'RS.—June, 1826.

Real estate was, after marriage, conveyed in trust for the separate use of the wife, with power to her, among other things, to sell and convey, and absolutely dispose of the same by deed, her coverture notwithstanding—*Held*, that it was competent for her, during the coverture, to charge such estate with the payment of her debts, and that equity would enforce such a contract by decreeing a sale of the estate.

That the general power granted her of disposing absolutely of the estate, included the power to incumber it by mortgage, or to charge it by contract.

Where the recital of a contract, charging an estate, was, that it was intended to *secure one debt*, and the body of the contract provided for the payment of *another debt* as well as the one recited, and there was no proof of mistake or fraud—*Held*, that the contract was to be considered as including both.

APPEAL from a decree of the Court of Chancery. The bill filed by the appellees' testator against the appellants, on the 4th of June 1816, stated that he was employed by *Frederick Price*, and *Penelope D. Price* his wife, (one of the defendants,) sometime in the year 1811, to perform certain carpenter's work in and upon a dwelling-house which the said *Frederick* was then erecting upon a tract of land, which he then held in right of his wife *Penelope*, and to which she was entitled in fee simple. That he did undertake and perform work and labour as a carpenter and joiner on said house, during which time *Penelope* directed him in the style and fashion of putting up and erecting said work. That the amount claimed by him for the said work, then unfinished, and labour, was $488 41, as contained in the account thereof exhibited. That *Frederick Price* obtained the benefit of the insolvent laws of this state, and was discharged from all claims of his creditors; and that the complainant then refused to proceed with his said work until he should be paid or secured for the work he had done. That the said *Penelope* requested him to proceed with and finish the work so commenced by him, and agreed, that if he would proceed with and finish the same, he should be paid for the work he had heretofore done, and also for the completion of the carpenter's work on the said house and buildings; and that to secure him for the said work which he had performed, and was to perform, the said *Penelope* offered to subject her said tract of land to the payment of the amount of the said work so done as aforesaid, and for work to be performed, and all materials furnished. That the said tract of land was conveyed by *William M'Mechen* to *Alexander Nisbet*, (the other defendant,) in trust for the sole use and benefit of the said *Penelope*, by deed dated the 12th of January 1810. That accordingly *Penelope* did, by her certain agreement, dated the 14th of October 1813, contract with the complainant to pay him for the work to be performed on the said house, and also to pay him for the work then unfinished, and for all materials which he might furnish in and about the premises; which said agreement was signed, sealed and delivered by her, and also signed by *Nisbet* the said trustee; and in and by which said agreement the said *Nisbet* is authorised to hold the said land charged with the payments for the said work, and to sell such part thereof as would satisfy the payment of all materials which the complainant might furnish at the instance of *Penelope*, and the payment of all unfinished work then about the said buildings, and for all work which he might thereafter do about the same, as by the agreement exhibited would appear. That the complainant, soon after commenced his work on the said buildings, and completed the same, and had the work measured and valued, and which amounts to the sum of $1949 53, as appears by an account thereof exhibited. That he found and furnished materials for the buildings to a considerable amount, &c. viz. $450, and that he had been put to considerable expense and trouble in and about the premises. That he had frequently applied to said *Penelope* and *Nisbet* for payment of the said sums of money, which they have uniformly neglected to pay or to give him any satisfaction therefor; and he had frequently applied to the said *Nisbet* to make sale of the lands so conveyed to him in trust, and in pursuance of the said agreement to pay to him the complainant the respective sums of money before mentioned, and all the interest thereon due; but that *Nisbet* refused to sell the said lands and pay the complainant, and had neglected and omitted to execute the said trust reposed in him. That the said *Frederick Price* is since deceased. Prayer, that *Penelope* may be decreed to pay to the complainant the said respective sums of money, and the interest thereon, so due to him, together with the costs of this suit, by a certain day to be appointed: and in default thereof that the land, mentioned in the said agreement and deed therein referred to, may be sold, and the proceeds thereof applied to the discharge of the complainant's said claim, interest and costs; and for other and further relief, &c.

Exhibit by the complainant, (besides his accounts, &c.)—A deed of trust executed by *William M'Mechen*, *Frederick Price*, and *Penelope D.* his wife, to *Alexander Nisbet*, dated the 11th of January 1811, reciting, that on the 12th of January 1810 the said *Frederick Price*, and *Penelope D.* his wife, had conveyed to the said *M'Mechen*, (which said deed the complainant also exhibited,) all the lands and estate which the said *Penelope* was or could be entitled to in virtue of the last will of *Thomas Cockey Deye*, and which by a division of a part of the real estate of the said *Deye*, made by order of the court of chancery, amongst certain of his devisees, was allotted to the said *Penelope* as lot number one—To hold the same unto the said *M'Mechen*, his heirs and assigns forever—In trust for the uses, intents and purposes therein expressed and set forth. That the said *Frederick Price*, and *Penelope D.* his wife, desirous to alter and change the said trust estate in relation to the said lot number one, &c. the above mentioned deed was executed, conveying the said lot number one to the said *Nisbet*, his heirs and assigns—"In trust, that the said *Alexander Nisbet*, and his heirs, shall henceforth be and stand seized of the said lot of land number one and premises, with the appurtenances, to and for the sole and separate use and benefit of the said *Penelope Deye Price*, so that she be permitted to use, occupy, and enjoy the same, and the rents and profits thereof to have, receive, take, and apply to her own sole and separate use and benefit, her coverture notwithstanding, for and during the term of her natural life, or until the same land and premises shall or may be disposed of by her in the manner hereinafter limited and expressed. And also upon this further trust, that the said *Penelope Deye Price* shall be suffered and permitted to sell and convey, and absolutely dispose of, by deed or deeds duly executed by her, the same lot of land and premises, or any parts, part or parcel thereof, to such person or persons, and for such sum or sums of money, or other consideration, as she at any time or times shall or may think proper, her coverture notwithstanding; so that the said hereby granted and released land and premises shall not, nor shall any part or parcel thereof, be subject at any time to the disposition or management of the said *Frederick Price*, or any future husband of the said *Penelope.*" Provision is then made as to such portion of the said land and premises as may remain undisposed of, &c.

The complainant also exhibited the following agreement, referred to in his bill, and which was afterwards proved under the commission which issued to take testimony: "*Baltimore* county, to wit. Whereas *Frederick Price*, husband of *Penelope Price*, is now building a house on a tract of land conveyed by *William M'Mechen, Frederick Price*, and *Penelope*, his wife, to *Alexander Nisbet*, in trust for the purposes therein mentioned, by indenture recorded in," &c. "And whereas *Robert Bigham* has undertook to complete the unfinished work now about said house. And whereas the said tract of land has been conveyed to the said *Alexander Nisbet*, in trust for her separate use, and she is desirous of securing to the said *Robert Bigham* the payment of the sum which the completing of the said unfinished work may amount to. Now therefore, these are to authorise the said *Alexander Nisbet* to hold the said tract of land charged with the payment of the amount of the said *Robert Bigham's* bill of work as before mentioned. And in case the said *Penelope Price* shall not pay, or cause to be paid, to the said *Robert Bigham*, the amount of his bill, which shall be ascertained by persons indifferently chosen by Mrs. *Price* and *Robert Bigham*, and if they differ in opinion, they are to choose a third; and the determination of any two to be binding on the parties, and the amount paid to the said *Bigham* by the first day of December 1814, which she hereby promises to do. Then the said *Alexander Nisbet* is hereby authorised to hold the said tract of land, charged with the payment of said sum; and the said *Nisbet* is hereby authorised to make sale of so much of said land as will satisfy the payment of all materials which said *Bigham* may furnish at the instance of Mrs. *Price*, and the payment of all unfinished work now about said building, and for all work which he may hereafter do about said building, and ascertained as aforesaid. In witness whereof, the said *Penelope Price* hath hereunto set her hand, and affixed her seal, the fourteenth day of October 1813.

Penelope D. Price. (L. S.)

Signed, sealed and delivered, in the presence of *Francis T. D. Owings.*

I have received notice of the within engagement made by *Penelope Price.* *Alex. Nisbet.*

The house to be completed and finished by the 15th of March 1814. Witness my hand and seal the said 14th October 1813.

Robt. Bigham, (L. S.)

Witness, *Francis T. D. Owings.*"

The answer of *Nisbet* is not considered to be material. That of Mr. *Price* admits that the complainant was employed by her husband in his lifetime to perform certain carpenter's work upon a dwelling-house, which her husband was then building, as stated in the bill of complaint; but she does expressly deny that she either did or could make any contract with the complainant, as stated in his said bill, she being then a married woman. She admits that the complainant did perform certain parts of the carpenter's work on said house during the life of her husband; but that a considerable part thereof then remained to be done and performed. And as her husband died insolvent, the complainant requested her to become responsible for the work which had been done on said house, and to be employed to complete the same; but she positively refused to engage or agree to pay for the work which the complainant had done, and had begun to contract with another carpenter to finish the same, who proposed to do the same in a plain manner, as she desired, for the sum of $700. That when the complainant understood she was about to employ another carpenter, he applied to her, and requested, that as he had lost the work already done on said house, he ought to be preferred in being employed to complete the carpenter's and joiner's work thereof, as he would do it as reasonable as any other person. That in consideration of this representation, she did agree that the complainant should finish the said work, and that she would pay him therefor, and also for any materials he might furnish for the same; and for this purpose, and with this view only, she entered into a contract with the complainant. But she expressly denies that she ever intended or agreed to pay the complainant for any work, either finished or unfinished, which had been done in the lifetime of her husband; and she so expressly understood the aforesaid contract at the time of executing it. And if there are any words therein which may imply any other engagement, they were artfully and covertly brought in to delude and deceive her, and were not observed or so understood by her at the time. That the complainant in finishing the said work did maliciously and fraudulently, against her repeated requests and his own agreement, execute work in the most expensive manner, and instead of completing the same by the 15th of March 1815, which he was bound and ought to have done, he neglected to finish the same until nearly about a year after that time, and even then he left it unfinished, to her great detriment and injury; and instead of executing the work in a neat, economical and plain manner, he did it in such a manner as greatly and unnecessarily to enhance the costs thereof, against her consent and wishes, and his repeated promises. That she has always been desirous and willing to pay the complainant whatever he was justly entitled to for finishing said work, and for the materials furnished by him; but he always demanded to be paid for work done in the lifetime of her husband, and under the contract; and has also demanded a much larger sum than he was entitled to for finishing said work. That she is willing to pay him whatever he may be justly and legally entitled to demand under the said contract, which she alleges he has violated in several respects, but particularly in the time and manner of finishing said work. All which matters and things are, as she is advised, properly and exclusively in the cognizance of a court of common law, and a jury. She therefore prays to have all the advantage thereof in the same manner as if the want of jurisdiction of this court had been presented in the form of a plea or demurrer, &c.

A commission issued, and testimony was taken under it, and the cause argued and submitted, &c.

JOHNSON, Chancellor, (December Term 1823.) On the 11th of January, 1811, *William M'Mechen*, who then held certain real property in virtue of a deed from *Penelope D. Price*, and

Frederick Price her husband, to him in trust for them, joined with them in a deed, by which the same property was conveyed to *Alexander Nisbet* in fee, in trust "that the said *Alexander Nisbet*, and his heirs, shall henceforth be and stand seized to and for the *sole* and *separate* use and benefit of the said *Penelope Deye Price*, so that she be permitted to use, occupy, and enjoy the same, and the rents and profits thereof to have, receive and take, and to apply to her own sole and separate use and benefit, her coverture notwithstanding, for and during the term of her natural life," &c. And on this further trust, "that the said *Penelope Deye Price* shall be suffered and permitted to *sell, convey, and absolutely dispose of*, by deed or deeds duly executed by her," the property, or such part as she pleased, her coverture notwithstanding.

It is alleged in the bill, and proved by the evidence in the cause, that *Frederick Price*, the husband, engaged the complainant, a carpenter, to build a dwelling-house on the property, and to find materials for that purpose; that before the same was finished, it being doubtful whether the husband would be able to pay for the building and materials, the complainant was unwilling to proceed unless the wife, who had the beneficial interest in the land on which the house was erected, would become responsible. Accordingly, on the 14th of October 1813, an agreement in writing was executed by her, under her hand and seal, of which *Alexander Nisbet*, the trustee, was apprised, as appears by his admission on the agreement itself. The agreement in substance is as followeth: Whereas *Frederick Price*, husband of *Penelope Price*, is now building a house on the land conveyed by *M'Mechen* to *Nisbet*, in trust for the purposes mentioned. And whereas *Robert Bigham* has undertook to *complete the unfinished* work now about said house, and *Penelope Price*, being desirous of securing to the said *Robert Bigham* the payment of the sum *which the completing of the said unfinished work may amount to*, therefore the agreement proceeds to "authorise *Nisbet* to hold the tract of land charged with the payment of the amount of the said *Robert Bigham's bill of work, as before mentioned.* And in case the said *Penelope Price* shall not pay, or cause to be paid, to the said *Robert Bigham* the amount of his bill, which shall be ascertained by persons indifferently chosen by Mrs. *Price* and *Robert Bigham*," by the first of December 1814, then *Nisbet* is authorised to make sale of so much of said land "as will satisfy the payment of all materials which said *Bigham may* furnish at the instance of Mrs. *Price*, and the payment of all unfinished work now about said building, *and for all work* which he *may hereafter* do about said building, and ascertained as aforesaid."

After the attention of the court had been called to this cause, and on the 8th of November 1822, an interlocutory decree was passed, in which it is observed, that "it appears by the order of my predecessor that this cause was argued before him at September term 1821, when no authorities in support of, or in opposition to the claim, were produced, in consequence whereof he directed a new argument; and in the order he observed, that a reference to the authorities as to the agreement having been executed by a *feme covert*, is desirable. None appears to have been submitted to him, nor have any such authorities been laid before me. Nor am I at this time prepared to determine on the merits of the case, either in respect to the obligation of the alleged contract, or its extent. But that as little delay may take place as possible, and as full an opportunity be given to the counsel to furnish authorities as the importance of the principle involved in the case demands, it is thought proper to pass an interlocutory decree, by which the sum the complainant may be entitled to recover, (if he can recover any sum,) will be made to appear. Without the aid of a recent examination of the authorities, and with the view of directing the attention of the solicitors to the point on which my opinion is suspended, I would remark, that it is clear that when previous to marriage, a marriage contract is entered into, vesting in trustees property for the sole use of the wife, subject to her disposal and her engagements, there a court of equity would compel a compliance with the terms of her contracts; and where she had been authorised to sell and dispose of the property held in trust for her separate use, there, I presume, it would be equally in her power to encumber the estate with her engagements, on the principle that the greater power comprehends the less. But are there any cases determined in which, after the marriage, the ordinary legal capacity of the wife can be enlarged so as to make her or her property responsible for her contracts? The case of the complainant is hard indeed; for if he has no remedy in this court, it is most clear to my mind, none can be obtained at law." The interlocutory decree then directs four accounts to be made—*First*, to allow to the complainant a just compensation for the *whole of the work and materials. Secondly*, only to allow to him for the materials and work after the 14th of October 1813; and if there is any contrariety in the evidence in regard to the value of the work, the two accounts above directed are to be stated according to the average value of the work and materials; and two other accounts, having the same regard to the contract of the 14th of October 1813 from the evidence of the appraisers solely.

On examining the evidence, the auditor discovered that there was no contrariety, and therefore, under the interlocutory decree, he reported two accounts, the one, No. 1, allows to the complainant for the whole of the work and materials. No. 2 rejects for the work and materials since the 14th of October 1813. The report is dated the 27th of January 1823. The sum due, if the complainant is entitled to the whole amount, is, including interest to the 1st of July 1823, $4164 63. If entitled to recover only for the work done, and materials found, subsequent to the contract, including interest as above, the amount is $3,454. Exceptions have been taken to the auditor's accounts on the part of the complainant.

Notwithstanding the request of my predecessor, and myself, as disclosed in the interlocutory decree, no authorities have been furnished or referred to by the solicitors on either side, and the cause remains to be decided, unaided by the assistance the researches of the counsel could have cast on the subject.

Two questions appear to me to arise in the cause. The first is the agreement, executed by a *feme covert* in the predicament in which Mrs. *Price* stood, binding and to be enforced in this court? Second. If obligatory, doth it extend to the whole work, and to all the materials? Cases of this description seldom arise in this state; indeed this is the first of the kind to which my particular attention has been drawn. But after the examination of the *English* authorities, where similar questions frequently arise, the doubts entertained previous to the interlocutory decree are entirely removed, and I have no hesitation in saying, situated as Mrs. *Price* was when she entered into the agreement, she was competent to bind herself so as to *affect the property* held in trust for her.

In *England*, previous to the case of *Ringstead vs. Lanesborough*, which was determined in the reign of *George* III, (*Co. Bankrupt Laws*, 32,) the law appears to have been clearly established, that it was incompetent for a *feme covert* to enter into any contract that would be binding at law; because she had no power to assent so as to bind herself; for in *consideration of law* she had no will of her own; for by the marriage contract her will was subject to that of her husband, of course she had no power to bind her husband, and it would be useless to bind herself, as she could have no property. By the marriage her personal property vested in her husband, and during their lives he had the control over the real. 1 *Pow. on Cont.* 93. But in the case of *Ringstead vs. Lanesborough*, it was determined that the contract of a *feme covert*, who had parted from her husband, by mutual consent, with a separate maintenance created by deed at the time of the separation, could be enforced even at law. But Lord *Mansfield*, in delivering the judgment of the court, declared "that his opinion was founded on all the circumstances of the case taken together, and would only be an authority in a case circumstanced exactly similar to the present." In the case mentioned, the circumstance of the husband's being a resident abroad was relied on. But in the case of *Bartvell vs. Brooks*, determined the year following, (*Co. Bankrupt Laws*, 36,) a broader ground is taken, to wit, that the *feme covert* is bound by her contracts *if the husband himself is not liable for her debts.* The case was this—An action was brought for goods sold and delivered to a *feme covert*, who pleaded the coverture; to which it was replied, that she lived separate and apart from her husband; that she had a separate maintenance regularly paid, and that the goods furnished were for her separate use and support. To the replication she demurred, which was overruled. In pronouncing the opinion, the court observed that the principle of the judgment in the case of *Ringstead vs.*

Lanesborough was, *that the husband was not liable.* The court of law having sustained these suits, in the next case of *Corbett vs. Poilnitz*, (1 *T. R.* 5,) moved a step farther, and if the principles which governed the last decision are to prevail, all contracts of *femes covert*, having a separate provision, and living apart from their husbands by mutual consent, may be enforced in a court of law, as if made by a *feme sole.* But the last determination appears not to meet with the approbation of subsequent courts, and the principles on which the judgment was predicated are most unanswerably proved by Mr. *Powell* to be incorrect. See 1 *Pow. on Cont.* 81 to 97 inclusive. In the three cases mentioned the deeds or instruments, by which the maintenance was created, were made after the marriage, and not in virtue of a previous marriage contract. Nor does there appear to be any fault found with the decisions, except that they were made by courts of law, whose judgment must be enforced, when pronounced against a *feme covert*, as if she was a *feme sole*; that is, her person and all her property be made subject to their operations, not confining them to the fund over which she had the sole control, as would have been the case on an application to a court of equity for redress. The power of the court of chancery to enforce the contracts of *femes covert* having property held in trust for them, over which they have the control, has never been questioned, except when the contract, or intended disposition of the property held in trust exceeds her power, as created and limited by the trust deed. I am perfectly satisfied in this case, that the power of Mrs. *Price* over the property was full and ample, and that she was competent to enter into the contract in question with the complainant; that she, her coverture notwithstanding, is bound by it, so far as to affect the trust fund. The extent of the agreement remains to be considered.

In this part of the case I am not so clear, but shall give to the contract that construction which is just, and of which it appears susceptible. Plausible reasons may be given limiting its operation to the work done, and to the materials found, subsequent to the date of the contract. To judge by the *recitals* of the instrument of writing itself, it would seem that she contemplated only to pay for future work and materials; for it *recites* that "she is desirous of securing to the said *Robert Bigham* the payment of the sum which the completing of the said unfinished work *may amount to.*" If the body of the instrument had pursued the language of the *recital*, I should have confined the contract to the future work, and future materials; but the language appears more extensive, and capable to comprehend the whole.

From the evidence in the cause, the work appears to have been faithfully done, and it is but just and equitable that the workman should receive compensation for the whole, and not for part only. If, therefore, the contract can embrace the whole, that construction should be given to it. If evidence *de hors* the instrument can have any influence, it is proved that the whole was to be covered by the contract; for *Edmund T. Scarff*, her manager on the farm, proves that she told him, *Bigham* would not go on with the work unless she would pay for the whole, and that she was, to use her language, *forced to agree.* What motive could induce a carpenter to go on and finish a building, if he was only to be compensated for his future labour and materials? But when the person, with whom the engagement is made, has, or is to have, the use and benefit of the whole building, it may fairly be inferred no reasonable objection would be made against paying for the whole; and if therefore the language of the instrument is sufficiently comprehensive, it ought to embrace the whole.

The agreement authorises the trustee to hold the property "charged with the payment of the amount of the said *Robert Bigham's* bill of work, as before mentioned;" and in case she should not pay "the amount of the bill, which shall be ascertained by persons indifferently chosen," by the first day of December 1814, "which she hereby promises to do," then the trustee is authorised to sell, &c. Unless the words in this section first taken from the agreement "before mentioned," limits *Bigham's* bill of work to future work, they are comprehensive enough to embrace the whole claim. But the latter part of the agreement appears more clearly to authorise a compensation for the whole. For the trustee is authorised to sell "so much of said land as will satisfy the payment of *all* materials which said *Bigham may* furnish at the instance of Mrs. *Price, and* the payment of *all unfinished work* now about said building, *and* for all work which he may *hereafter* do about said building."

The only doubt, of which the part of the agreement last quoted is susceptible, is, whether she was to pay for the materials before furnished; for it expressly provides for those which *may* be furnished; and expressly provides for the payment of "all *unfinished* work *now* about said building," as well for that which "he may hereafter do;" that is, both unfinished work then done, as well as for all future work, are to be paid for. In my opinion the agreement comprehends all the work and materials. But if the agreement did not extend to the anterior work and materials, yet, as she had the whole benefit of them, and as they were placed on her separate property evidently with her consent, and have not been paid for, even on this ground the complainant would seem entitled to relief.

The exceptions of the complainant, so far as they extend to the account No. 2, omitting to charge the defendants with the $488 41, are ruled good; but so far as they relate to the manner of charging the interest in the account No. 1, are overruled, and that account is confirmed—*Decreed*, that unless the defendants shall, on or before, &c. pay to the complainant, or bring into this court to be paid to him, the sum of $4164 63, with interest on $2862 29, a part thereof, from the 1st day of July 1823, until paid, together with the costs of this suit, the property in the proceedings mentioned shall be sold, &c. From this decree the defendants appealed to this court, where the death of *Bigham* was suggested, and his executors appeared, and were made parties.

The cause was argued at June term last before BUCHANAN, Ch. J. and EARLE, STEPHEN, and ARCHER, J.

Mayer, for the Appellants. 1. It is attempted, in this case, to charge certain real estate with the appellees' claim, in consequence of the supposed interest in Mrs. *Price* in it, or of her disposing power over it. The property attempted to be thus affected, is described in a deed of trust of Mrs. *Price* to *Alexander Nisbet*, and there the appellees contend such interests and powers are secured to Mrs. *Price*, as under the contract of that lady with their testator, subject the land to his claim. We shall endeavour, in the first place, to show what interest was given by this deed to Mrs. *Price*, and what was the nature of the power in regard to the land which it conferred upon her. The deed conveys the land, (Lot No. 1,) to *Nisbet*, in trust, "to and for the sole and separate use and benefit of *Penelope D. Price*, so that she be permitted *to use and enjoy the same, and the rents and profits thereof*," for her life, or until disposed of as thereinafter limited, and upon the "further trust that she shall be suffered and permitted *to sell and convey*, and *absolutely dispose of*, by deed or deeds, *duly executed* by her," the said lot, or any part of it, "for such sum or sums of money, or other consideration," as she may at any time think proper, "her coverture notwithstanding." The deed proceeds then to give her a power of appointment by will, and then limits the estate, in default of appointment, in further trust, "for the right heirs of the said Mrs. *Price*, and their assigns, as tenants in common, *in fee*," and that the trustee shall "convey the same accordingly." This conveyance vests in Mrs. *Price* only a life-estate in the land—and secures the remainder in fee upon it to such persons as shall prove to be her "right heirs"—and the power of sale, &c. imparts to her no additional interest. Although it may be true, (notwithstanding our act of assembly abolishing livery of seisin, of 1715, *ch.* 47,) that the deed here, since it contains words of bargain and sale, as well as of feoffment, operates as a deed of bargain and sale would in *England*, and conveys to Mrs. *Price* only a trust estate; yet it is observable, that the deed secures to her the *immediate* enjoyment of the land, and its profits, for her life, without the control of the trustee either over the land or its product. It secures her, therefore, *effectively*, an estate *such* as she would have had under a deed of feoffment to *Nisbet*, for her use, for life; and though therefore, the statute has not in fact executed the use in her, the peculiar phraseology of the deed requires an interpretation of her interest, *as if* the use were executed. This too, is the more evidently the right construction, when we find that she has, by the terms of the deed, no power secured to her of disposing of her life-estate, independently of her husband's concurrence, and differently from that mode of alienation, which by our acts of assembly is enjoined for a *feme covert's* interest in land. In *England* it is usual, as will appear in almost all the cases there which relate to the questions now involved, the beneficial interest is to be enjoyed by the wife derivatively from the trustee; as, for example, where she is to receive the rents, the trustee is to have them in trust, to pay them over to the *feme covert.* This gives the trustee a control over the substance and usufruct of the estate, and makes him, in some cases, as the depository of the *beneficium* of the trust, amenable to a court of chancery, and virtual surety to the extent of his trust-avails for the wife.

2. The estate given to Mrs *Price* by the deed of trust to Mr. *Nisbet*, is only for life. The ultimate limitation to her heirs, refers to them as heirs, only *descriptione personarum.* It eventually gives the land, in default of her appointment, to her right heirs "*in fee,*" and as "*tenants in common.*" The superadded words "*in fee,*" of themselves, denote the "right heirs" to be purchasers, as it makes them the *propositi* and the beginning of an estate "*in fee;*" and then the qualifying their estate as a tenancy in common, contrary to what it would have been if by descent, confirms the idea that they take by purchase and not by limitation. It is to be remarked too, that the estate is to be conveyed to the heirs by the trustee, for the *expressed purpose* of putting an end to the trust, and giving them the legal estate. The estate, therefore, secured to them is a legal estate, while Mrs. *Price's* precedent life-estate is equitable. These two estates cannot coalesce to make up the fee in her, and hence Mrs. *Price* can take only a life-estate, and the rule in *Shelly's* case cannot serve here to enlarge her interest into a fee. It is, besides, to be observed, that a court of equity does *not*, in reference to equitable estates and trust settlements, hold itself bound by the rule in *Shelly's* case, with the same invariable strictness that it is applied, by courts of common law, to legal estates. Chancery never does enlarge the precedent life-estate into an estate in fee simple, or fee tail, in consequence of a subsequent limitation, unless by not doing so they violate the manifest intention of the grantor. It cannot be pretended, that any such intention is indicated here—but, on the contrary, the words, and the whole scope of the trust, show

that Mrs. *Price* was meant to have only a life-estate. *No power being reserved to Mrs. Price of disposing of her life estate,* she could not charge it, as pretended by the appellees, and could convey it only *in conjunction with her husband.* There is nothing, therefore, to which the appellees' demand can apply.

3. The power of selling the fee, reserved to Mrs. *Price,* does not vest in her the fee simple interest. Conferring on her no right to the proceeds of sale, and not showing how they shall be appropriated, she stands invested with a mere authority, uncoupled with any interest, except *perhaps* as at common law, and subject to all her husband's rights. He might have disposed of the proceeds, and could only have been prevented by the interference of chancery, as in ordinary cases of the product of a wife's interest in realty. Without the most explicit provisions to that effect, a wife obtains no *separate estate* in land under a settlement. The authorities show, that the terms must be so unequivocal and exclusive, as to leave *no question* that the estate is to be *separately* and *exclusively* her's.

4. The settlement does not authorise Mrs. *Price* to sell the land as if she were a *feme sole,* but empowers her to do so only by deed duly executed. It must be executed by her *and her husband,* according to our act of assembly, which comprehends all conveyances in which a *feme covert* is "*named as a grantor.*" The proper construction of the power of sale is, according to *Chudleigh's* case, that the trustee here has the entire legal and beneficial interest, and the purchaser obtains it by way of a springing use. The power here excludes the husband's marital *interest,* not the marital care and guardianship in reference to her conveyances, on account of which superintendance the law requires him to unite in them.

5. There was no contract "to sell" here, as pointed to by the power; and no attempt to execute the power; and without such an attempt a court of equity never interposes to carry a power into specific performance. The contract between Mrs. *Price* and *Bigham* is not to be effectuated as an informal execution of her power, under the settlement, of "selling and disposing."

6. The contract even of one *sui juris*, like that between Mrs. *Price* and *Bigham*, would not bind *specific* property, as it is pretended shall be done here.

7. It is only personalty, secured to a wife's separate use, that has ever been esteemed, without an express *special power* of disposing and charging it, subject to the wife's power in those respects *as if she were a feme sole*—and rents and profits, regarded as personalty, and *when under the trustee's control.* Real estate, *though settled to her separate use*, is not, from that circumstance alone, liable to be disposed of and charged by her as if she were unmarried. She must be expressly authorised to that effect, or the trustee must have control over the rents and profits. There is no valid charge therefore here.

8. A decree, especially under the circumstance of this case, against a wife's separate estate, must be executed through coercion of the trustee, under his power over the usufruct of the land. No decree, as was done in this instance, can be rendered against the wife, or *for the sale of the land.*

9. The contract between Mrs. *Price* and *Bigham* should, if regarded at all, be considered, according to the original understanding, as embracing the work to be done, and not that already executed. The recitals of the contract show that this was the intent; and the provision for the old work is foisted into the agreement fraudulently, as *Nisbet* proves, and as *Bigham* himself meant, when he said there was a "*take-in*" in it. Parol evidence on this head, in withstanding specific performance, is admissible to prove fraud or mistake.

10. There is no proof as to the extent of work done before, and that done after the contract. Part of the account is a demand of *Bigham* and *Barber*, and not *Bigham* alone. The work was extravagantly done. *Bigham* admitted he had lost his demand for the old work. Neither the value of the old, nor of the new work, appears to have been ascertained *according to the mode prescribed by the contract.*

11. A contract, to be specifically performed by chancery, *must be above all exception, and free from all suspicion.* This contract is not only liable to suspicion, but proved to be fraudulent, by its recitals and structure.

12. *Nisbet*, as a disinterested person, is a competent witness;

and having been cross-examined without protest, his evidence is admissible, although no previous order for examining him was obtained by Mrs. *Price*.

13. The position that Mrs. *Price's* estate is to be dealt with, on the score of liability for her engagements, as if it were a use executed, is enforced by analogy from cases of constructive trusts. The principles there, show Mr. *Nisbet*, in this case, to be a mere nominal instrument, in reference to the trust, with no control, liable to no obligation, and to no degree of equity, in reference to the land, or its rents and profits—the only mode by which *a feme covert's separate estate can be made liable for her engagements.*

14. At all events, Mr. *Nisbet*, as the guardian of the estate, and not a stranger, should be the trustee for any sale ordered under the proceeding—And all the land should not be absolutely decreed to be sold, but only the necessary part for satisfying the demand.

15. We have finally made a question, whether the deed of trust to Mr. *Nisbet* is valid, and whether it has fully, or in any respect, superseded or revoked the prior deed of trust to Mr. *M'Mechen*. It will be observed, that by that original deed of trust to *M'Mechen*, the lot No. 1, which is the only land comprised in the deed to *Nisbet*, is conveyed in trust for Mr. *Price*, *after Mrs. Price's death;* and after his death, as she should appoint *by will;* and to her heirs, in default of appointment. There is no express limitation of an estate for life to Mrs. *Price:* she, therefore, takes a resulting use out of her former estate for life. The conveyance to *M'Mechen* is by bargain and sale, and the limitations are therefore trust-estates, or uses on uses. With those estates, consequently, Mrs. *Price's* estate, being but an abiding use out of her primitive interest, cannot unite; and therefore the final limitation to her heirs cannot avail to give her an estate in fee, which she professes to dispose of by the deed to *Nisbet*, and which, to make that deed effectual, she must have had. To the same point we might here apply the remarks we used in reference to the right of the heirs, as mentioned in the deed to *Nisbet*, so as to take the limitations there, according to the construction of courts of equity, out of the rule in *Shelly's* case. In the case of *Pybus vs. Metford*,

where there was also an estate for life by implication, and remainder to the heirs of the tenant for life, and where the remainder was held to enlarge the estate for life, according to *Shelly's* case, the settlement was by covenant, on the part of the tenant for life, to stand seized to uses, and as well the estate for life as the remainder was served immediately out of the original use. As to the fee, therefore, we think it indisputable that the deed to *Nisbet* did not revoke the deed to *M'Mechen;* and so far as the claim of the complainant reposes on the power of selling lot No. 1, as reserved to Mrs. *Price* in the deed to *Nisbet*, it certainly cannot prevail. It is plain, then, that the power of selling, or any actual or constructive limitation of the fee, in the deed to *Nisbet*, is entirely invalid. And we further contend, that that deed does not operate at all, and not even on Mrs. *Price's* life-estate as secured to her by the deed to *M'Mechen*. The avowed purpose, and moving consideration of the deed to *Nisbet*, as recited in it, was to change the trusts of the prior deed. In regard to Mrs. *Price*, no change of estate was made, for in both deeds she is alike provided for, and in neither has she a power of disposing even of her life-estate The leading object of the deed, the change of the trusts, could not be gratified in consequence of the peculiar limitations of the deed to *M'Mechen*; and therefore, we insist, that the deed to *Nisbet* cannot, for any purpose, or to any extent, be operative. For it must be remembered, that courts of equity, in construing deeds of trust, regard the declared intention of the grantors as a binding rule, and as the object for which alone the deed is to stand. Hence, in *New York*, where the estate described would, if a legal estate, be deemed only for life, it has been declared a fee simple interest, because no other would serve the intention of the grantor, and answer his defined purpose.

On the *second point*, he cited *Fearne Cont. Rem.* 84, 86, 88, 90, and the remarks on the case of *Bagsham vs. Spencer*.

On the *third point*—3 *Leon.* 71. *Bradley vs. Westcott*, 13 *Ves.* 445, 451. *Thorpe vs. Goodall*, 17 *Ves.* 388, 460, 462. *Townsend vs. Windham*, 2 *Ves.* 3. *Darley vs. Darley*, 3 *Atk.* 399. *Lee vs. Prieaux*, 3 *Bro. Chan. Rep.* 382. *Lumb. vs. Milnes*, 5 *Ves.* 517. *Hartley vs. Hurle*, *Ibid* 540. *Bran-*

don vs. Robinson, 18 *Ves.* 434. *Rich vs. Cockell*, 9 *Ves.* 370, 377. *Brown vs. Clark*, 3 *Ves.* 166. *Dakins vs. Berisford*, 1 *Chan. Cas.* 194. *Jacobs vs. Amyatt*, 1 *Madd. Rep.* 376. 1 *Madd. Chan.* 372, 380. *Birch vs. Blagrave*, *Amb.* 264. *Wright vs. Englefield*, *Ibid* 461. *Peacock vs. Monk*, 2 *Ves.* 190. *Wright vs. Cadogan*, 6 *Bro. Parl. Cas.* 156. *Rippon vs. Dawding*, *Amb.* 565. *Dillon vs. Grace*, 2 *Sch. & Lef.* 463. *Hulme vs. Tenant*, 1 *Bro. Chan. Rep.* 16. S. C. 2 *Dick.* 560. *Fettiplace vs. Gorges*, 1 *Ves. jr.* 46. S. C. 3 *Bro. Chan. Rep.* 8. *Pybus vs. Smith*, *Ibid* 340. S. C. 1 *Ves. jr.* 193. *Rich vs. Cockell*, 9 *Ves.* 369. *Wagstaff vs. Smith*, *Ibid* 520. *Sturgis vs. Corp*, 13 *Ves.* 190. *Whistler vs. Newman*, 4 *Ves.* 129. *Grigby vs. Cox*, 1 *Ves.* 518. *Essex vs. Atkins*, 14 *Ves.* 547. *Mores vs. Huish*, 5 *Ves.* 692. *Hulme vs. Tenant*, 1 *Bro. Chan. Rep.* 17, *(note.)* *Methodist Episcopal Church vs. Jaques*, 3 *Johns. Chan. Rep.* 113.

On the *fourth* and *fifth points*—7 *Bac. Ab.* tit. *Uses and Trusts*, 112; and *Chudleigh's* case, 1 *Coke*, 121.

On the *sixth point*—*Bull vs. Vardy*, 1 *Ves. jr.* 270. *Arundel vs. Phillpot*, 2 *Vern.* 69. *Hulme vs. Tenant*, 1 *Bro. Chan. Rep.* 21. *Thorpe vs. Goodall*, 17 *Ves.* 388, 460, 462. 2 *Madd. Chan.* 372, 380.

On the *seventh* and *eighth points*—*Duke of Bolton vs. Williams*, 2 *Ves. jr.* 138. *Jones vs. Harris*, 9 *Ves.* 486, 498, 521. *Wagstaff vs. Smith*, *Ibid* 521. *Hulme vs. Tenant*, 1 *Bro. Chan. Rep.* 17, *(note.)* *Dillon vs. Grace*, 2 *Sch. & Lef.* 456. *Heatley vs. Thomas*, 15 *Ves.* 596. *Standford vs. Marshall*, 2 *Atk.* 69, *Lee vs. Muggeridge*, 1 *Ves. & Beam.* 118. *Bullpin vs. Clarke*, 17 *Ves.* 365. *Bull vs. Vardy*, 1 *Ves. jr.* 270. *Arundel vs. Phillpot*, 2 *Vern.* 69. *Hulme vs. Tenant*, 1 *Bro. Chan. Rep.* 21. *Thorpe vs. Goodall*, 17 *Ves.* 388, 460, 462. 1 *Madd. Chan.* 372, 380.

On the *ninth point*—1 *Pow. on. Cont.* 404, 294, 432, 427, 428. *Ham. Dig.* 288. 2 *Eq. Ca. Ab.* 480, 482. 1 *Fonbl.* 188, 189. 2 *Fonbl.* 43, 135.

On the *eleventh point*—1 *Fonbl.* 122, (and *note.)* 1 *Pow. on Con.* 294. 2 *Eq. Ca. Ab.* 480, 482. *Montague vs. Maxwell*, 1 *P. Wms.* 620. *Brooke vs. Turner*, 1 *Mod.* 212.

On the *twelfth point*—1 *Phill. Evid.* 40. *Goodtitle vs.*

Welford, Dougl. 140. *Goss vs. Tracy,* 1 *P. Wms.* 287, 290. *Lowe vs. Jolliffe,* 1 *W. Blk. Rep.* 366. *Anonymous,* 1 *Mod.* 107. 1 *Eq. Ca. Ab.* 225. 2 *Eq. Ca. Ab.* 396, 397.

And, on the *thirteenth point—Hulme vs. Tenant,* 1 *Bro. Chan. Rep.* 16. *Harg. Co. Litt.* on constructive trusts.

Moale and *R. Johnson,* for the Appellees. 1. To show that no suit at law could be sustained for the recovery of the claim of the appellees, they cited 1 *Pow. on Cont.* 81 to 87. *Marshall vs. Rutton,* 8 *T. R.* 545. *Boggett vs. Frier,* 11 *East,* 301. *Kay vs. Dutchess de Pienne,* 3 *Campbl.* 12. *Marsh vs. Hutchinson,* 2 *Bos. & Pull.* 226. *Burfield vs. De Pienne,* 5 *Bos. & Pull.* 380. *M'Namara vs. Fisher,* 8 *T. R.* 302. *Derry vs. Mazarine,* 1 *Ld. Raym.* 147. *Compton vs. Collinson,* 1 *H. Blk.* 348, 349; and *M'Namara vs. Fisher,* 3 *Esp. Rep.* 18.

2. As to the estate which Mrs. *Price* took under the deed of trust of 1811, and whether the limitations in that deed were executed by the statute of 23 *Hen.* VIII; and to show that it was a trust, and not a use, and not executed by the statute, they cited *Harton vs. Harton,* 7 *T. R.* 648 *Shapland vs. Smith,* 1 *Bro. Chan. Rep.* 75. *Nevil vs. Saunders,* 1 *Vern.* 415. *Gregory vs. Henderson,* 4 *Taunt.* 772. 1 *Madd. Chan.* 360. *Carwardine vs. Carwardine,* 1 *Eden's Rep.* 27, 36, (*note* a.) 2 *Blk. Com.* 365, 335, 336, (and note by *Christian;)* and *West vs. Biscoe,* 6 *Harr. & Johns.* 465.

3. That the appellees were entitled to the relief prayed in the bill; and that Mrs. *Price* had a right under the limitations in the deed to charge the land; and that she had charged it with the payment of the appellees' claim, they cited *Hulme vs. Tenant,* 1 *Bro. Chan. Rep.* 16, 21. *Grigby vs. Cox,* 1 *Ves.* 517. *Parkes vs. White,* 11 *Ves.* 208. *Methodist Episcopal Church vs. Jaques,* 3 *Johns. Chan. Rep.* 77; and *Skinner vs. White,* 17 *Johns. Rep.* 358.

Curia adv. vult.

EARLE, J. at this term delivered the opinion of the court. We have carefully reviewed the chancellor's decree in this case, and after deliberately considering the objections to it, we cannot see any cause to differ in opinion with him.

The two principal objections consist of a question of fact, and a question of law. The first is to the claim or demand exhibited by *Bigham*, the complainant; the last arises upon the marriage settlement appearing in the record. They will be considered in the order in which they are here presented.

The claim set up by the complainant, is a carpenter's account for materials found, and work done, to a large dwelling-house, built by him on the land of the defendant, *Penelope D. Price*, for which he complains he has never been paid. The payment of this debt is not insisted upon, nor even pretended; but it is urged that the building was not finished by the time specified in the contract; that the account is an extravagant one, consisting of many items of expensive work, done to swell and enhance the bill, and that a part of it, performed under a contract with the husband of *P. D. Price*, since deceased, she was made to assume by unfair and improper means.

These objections to the complainant's demand are to be judged of by the testimony in the cause, which has been attentively examined by the court; and after much reflection, we do not think they are sustained. The delay in the completion of the edifice is attributable to the defendant, *P. D. Price*, herself, who suffered the workmen to board at an inconvenient distance from their work, and to be often without employment for want of materials, which were to be hauled in her waggon. The work alleged to be extravagant is suitable to the original plan and outline of the building, and some of it, particularly the inside window shutters, was put up by *P. D. Price's* special directions; and her written assumption to pay for the work about the dwelling-house on her land, in her husband's lifetime, was not obtained by unfair and improper means, being a clause in an agreement entered into by her, under the immediate eye of her husband, and with the express approbation of the defendant, *Alexander Nisbet*, who is the trustee of her estate, and undertook the special business of guarding and protecting her interest.

The question of fact being disposed of, the law objected to the decree, is next to engage our attention. It brings into view a point, which has never before, perhaps, been acted upon by the courts of this state. A married woman, by her contract under seal, charges the payment of a debt on her real estate, which was settled on her by a deed of trust, for her separate use, with a power to sell and convey, and absolutely dispose of the same, by deed or deeds duly executed by her, her coverture notwithstanding; and the question is, how far a court of equity will sanction and enforce the contract, and decree a sale of the land to pay the charge?

Those kind of settlements are in derogation of marital rights, and generally speaking, are not productive of domestic happiness; and perhaps it might be questioned, whether it comports with public policy to favour and encourage them. That they are sometimes commendable, and even useful, cannot, however, be doubted by any. When they are entered into after marriage, they are commonly suggested by some necessity not discovered before the nuptial tie, and are often the means of rescuing families from penury and distress. What led to the settlement under consideration, it is not for us to surmise, but its having been executed subsequent to the union between the husband and wife, is certainly not a circumstance unfavourable to a liberal construction of it.

With these sentiments of the instrument, we proceed to the interpretation which ought, we think, to be given to it. And it appears to us we cannot be mistaken when we observe, that the *jus disponendi* imparted to the wife by this deed of settlement, necessarily includes in it the power to incumber or charge the land conveyed to her as her separate property. She may sell and convey, and absolutely dispose of her estate, by a deed or deeds duly executed by her, and this, agreeably to the terms of the settlement, without the assent of her trustee, or the concurrence of her husband. If then, by a deed or deeds duly executed by her, she can sell and dispose of the whole interest in her land, how can the power to incumber it by mortgage, or charge it by contract, be denied to her? The law allows her, notwithstanding her coverture, to part from her whole estate, upon the principle, that in doing so she acts as a *feme sole* as to her separate property, and upon the like principle, and to promote fair dealing, it must be conceded to her, to incumber and charge it with her debts.

The contract of the 14th of October 1813, between *P. D.*

Price and *Bigham*, authorises the trustee *Alexander Nisbet*, to hold the land charged with the payment of the amount of his bill of work, and in case it is not paid by a given time, it authorises him to make sale of so much thereof as will satisfy the payment of it. And can there be a moment's doubt with any one, that if she had been in fact a *feme sole*, equity would have enforced the charge according to the agreement? The greater part of this work was moreover furnished on the faith of this contract, and there seems to be a peculiar equity in making the property, improved by his skill and labour, liable to *Bigham* for the payment of his bill. We decide the case, however, upon the ground of the charge being within the meaning and spirit of the disposing power over her separate estate, secured to the wife by the deed of settlement.

We might perhaps have left the adjudication of this case to rest on the broad grounds, that *P. D. Price* made the contract as a *feme sole*, and that her separate estate is liable for the payment of this debt, without a special charge to make it so; but there is no necessity to insist here upon this doctrine, and therefore we intend to observe silence in relation to it. We choose rather to base our opinion on the position, that *P. D. Price*, having, under the appointing and disposing power of the settlement, specifically charged her separate property with the payment of the debt, it ought to be sold to satisfy it.

DECREE AFFIRMED;

And also *Decreed*, that unless the appellants pay to the appellees the amount ascertained by the said decree to be due by the appellants, with interest, &c. as also the costs incurred by the appellees' testator in the Court of Chancery, and by them in this court, or pay the same into the Court of Chancery on or before, &c. the property mentioned in the proceedings, or so much thereof as may be necessary, be sold according to the said decree of the Court of Chancery, and pursuant thereto, for the purpose of satisfying the sum of money so decreed, with the interest thereon, and the costs aforesaid; and that the Chancellor make all necessary orders for carrying into effect the decree of the Court of Chancery, and of this Court.

KEMP'S EX'X. *vs.* M'PHERSON, *et al.*—June, 1826.

S devised his real estate to his son J, at and for the price of £2000, the same to be paid by J, in equal shares, and at defined periods, to ten of the other children of the testator—J to give his bonds to such of the children as were of age for the payment of their proportions; and that J should have such estate in fee, he complying and paying to the said children their said shares of the said money. J took possession under the devise, paid some of the legacies, and afterwards sold the estate in fee to K, and executed a conveyance, referring to the devise, with warranty of title, K paying him at the time of the conveyance, a part of the purchase money, and giving him his bonds for the residue. Some of these bonds were assigned by J to M, and others. One of the bonds assigned to M, was paid by K, who always admitted his liability for the rest. K then died, and M obtained judgments at law upon the bonds he held, against D, the executrix of K. Some of the legacies bequeathed to S's children were not paid, and a decree was passed for the sale of the said estate for their payment. K, by his will, dated *before the conveyance* to him of the estate, devised all his estate to D, and made her his executrix. On a bill filed by D, stating herself to be the executrix and devisee of K, against M, to be relieved from the said judgments, on the ground that the said legacies were out standing and an incumbrance on the said estate, and that until they were discharged, the payment of the bonds should not be enforced. A copy of K's will, and of his deed from J, were filed as exhibits with the bill. M's answer admitted D to be the devisee of the estate.

Held, 1. That land acquired after the execution of a will, does not pass by the will.

Held, 2. That whether the admission in M's answer, that D was the devisee of the said estate, when by D's own showing it appeared that she was not, precluded an enquiry into that fact, and that it was to be considered as not in issue. *Quere.*

Held, 3. That the legacies were a charge on the estate, either in the hands of J, or of the purchaser under him.

Held, 4. That although it is a general rule that an assignee of a bond is liable to all equities which exist against his assignor, yet there are circumstances which may place the assignee in a better situation than the assignor. That the conduct of the obligor may be such as to deprive him of an equity which he had against the assignor.

Held, 5. That wherever an assignee is induced to believe by the obligor, that the bond to be assigned will be paid, it would be a deceit upon the assignee to suffer the obligor afterwards to set up as a defence a concealed equity existing between him and the assignor.

Held, 6. That under the circumstances of this case the equity relied upon in the bill against the bonds upon which the judgments were rendered, was a concealed equity between the obligor and assignor, and could not affect M, the assignee; and, therefore, the relief prayed could not be granted.

Appeal from a decree of *Frederick* County Court, sitting as a Court of Equity. The bill, filed on the 7th of November 1816, in the name of *Dorothy Kemp*, executrix of *Frederick Kemp*, against *Jacob Staley*, *John M'Pherson* and *Gilbert Kemp*, (the appellees,) stated that *Joseph Staley*, deceased, in his lifetime, being seized in fee of certain tracts of land lying in *Frederick* county, called *Foxe's Spy* and *The Resurvey on Low Hemper*, by his will dated the 4th of February 1808, devised, among other things, as follows: "I give and devise unto my son *Jacob Staley*, the plantation whereon I now dwell, at and for the price of two thousand pounds, current money, exclusive of my wife's thirds or dower, which I desire shall consist of the dwelling-house, garden and other improvements near the dwelling, and about twenty-five acres of land cleared, with the privilege of fire-wood—all during her natural life. And the two thousand pounds aforesaid to be paid by my said son *Jacob Staley* to my ten following named children; that is to say, to *Ann Mary Smith*, *Elizabeth Staley*, *Catharine Waughter*, *George Staley*, *Solomon Staley*, *Molly Staley*, *Mary Staley*, *Moses Staley*, *Susanna Staley*, *Maria Juliana Staley*, in equal shares, making to each the sum of two hundred pounds current money; which I desire and request him to pay in the following manner: One hundred pounds to each within one year after my death, and one hundred pounds to each at the expiration of two years after my death, to all my children named as aforesaid, except *Moses*, *Susanna* and *Maria Juliana*, who are yet under the ages as prescribed by law. Their parts I desire my said son *Jacob* to pay them respectively as they may arrive at age. And my will is that he pass bonds to those of age for the sums allotted to each, and payable at the periods above stated. Which said plantation, whereon I live, contains about one hundred and ninety-two acres, I give and devise as aforesaid to my son *Jacob Staley*, his heirs and assigns forever, in fee simple, he complying and paying to my other children the sums aforesaid, and letting my wife enjoy for and during her life that part assigned to her for her thirds or dower, unmolested." The bill then stated, that under the true legal construction of this devise of *Joseph Staley*, the lands aforesaid, being the plantation on which the testator dwelt, is liable for and chargeable with the said sums of money so bequeathed to his children as aforesaid. That *Jacob Staley* has paid and discharged the legacies bequeathed to six of the children of the testator, and four of the said legacies left to four of the children are still unpaid, to wit, the legacy left to *Margaret*, who married *Michael Bruner*, the one left to *Susanna*, who married *George Bruner*, the one left to *Moses Staley*, and that left to *Maria Juliana*. That *Jacob Staley*, after the making the will aforesaid, and after the same was admitted to probat, contracted to sell the aforesaid lands so devised, together with another tract of land called *The Country Seat*, to *Frederick Kemp*, deceased, at and for the price of £2700 current money, and a few days thereafter conveyed the said lands to the said *Kemp*, [excepting the part devised by *Joseph Staley*, to his widow during her life; and also excepting one acre and 6 perches, part of *Foxe's Spy*, conveyed by *Jacob Staley* to *Peter Kemp*, on the 30th of August 1809. The land called *The Country Seat* is stated to have been conveyed on the same day to *Jacob Staley* by *Peter Kemp*, containing one acre and six perches,] by deed dated the 19th of February 1810, with a general warranty, and a covenant for further assurance, &c. That after the said contract, when bonds were to be executed for the purchase money, deducting £600 which was paid in cash, *F. Kemp* was sick, and his wife, (the complainant,) with *Gilbert Kemp*, executed the bonds for the balance of the purchase money, on behalf of the said *F. Kemp*. That the said bonds were without interest, and regularly paid as they became due, until *F. Kemp* recovered from his indisposition, when, on the 11th of June 1812, he, together with *Gilbert Kemp* his surety, executed four bonds each for the payment of £300, payable, without interest, at the times specified in the said bonds; upon which the bonds executed by the complainant, then the wife of *F. Kemp*, were cancelled. That the bonds so executed by *F. Kemp* were for the balance of the purchase money of the said lands so sold by *Jacob Staley* to *F. Kemp*, and in lieu of the bonds before given by the complainant, &c. That *Jacob Staley* afterwards sold and assigned the said bonds, three of them to *John* M'*Pherson*, (one of the defendants,) and one of them to *Elizabeth Bierly*; and one of the bonds so sold to M'*Pherson* has been paid and discharged. That M'*Pherson* has brought suit (in the name of *Jacob Staley* for his use,) against the complainant as executrix of *F. Kemp*, on one of the bonds dated the 11th of June 1812, and payable on the 1st of February 1815, in which suit, she having no defence at law, she confessed judgment at October term 1816. The bill further charges, that at the time of the contract for, and the conveyance of the said lands, *F. Kemp* was ignorant of the legal construction of the will of *Joseph Staley*, and did not know that the land so devised was subject to, or liable for, the amount of the legacies charged thereon by the said will; and the £2700, given, was the full value of the land at the time of the purchase and conveyance thereof, and which was bought by *F. Kemp*, free from all claims. That *Jacob Staley* has removed out of the state, and left no property, and three of the legatees, who were unpaid by him, viz. *Margaret*, together with her husband *Michael Bruner; Susanna*, together with her husband *George Bruner*, and *Moses Staley*, filed a bill in the court of chancery against the said *Jacob Staley*, and the complainant, claiming to make the said land, so devised, liable for the amount of their legacies; to which bill an answer has been put in, and evidence taken under commission, and the cause stands in the court of chancery under rule for final hearing. That it is believed the court of chancery must, under the principles of the said court, decree that the said legacies are a lien upon the said land. That besides the legacies for which the said bill is filed, there is one other legacy due under the will of *Joseph Staley*, to wit, the legacy due to *Maria Juliana*, who is still an infant, and has not yet brought suit for it. The bill further charges, that the bonds thus given to *Jacob Staley* by *F. Kemp*, and assigned to *M'Pherson* and *Bierly*, are, in the hands of the assignees, liable to be affected by all equity to which they were liable in the hands of the assignor; and the amount of the legacies being greater than the amount of the bonds, that the said land ought in equity to be exonerated from the payment of the purchase money still due. That *F. Kemp* is since dead, having by his will (which is exhibited, dated the 10th of June 1809,) made the complainant his devisee and executrix. *Prayer* for an injunction against *Jacob Staley* and *M'Pherson*, to desist from all proceedings upon the judgment aforesaid; and for general relief. Injunction was issued, and a publication ordered against *Jacob Staley*, the absent defendant. The answer of *Gilbert Kemp* is not material to the case. That of *M'Pherson* admitted the assignment to him of three of the bonds of *F. Kemp* by *Jacob Staley*, for a valuable consideration, and an assignment of one of them to Mrs. *Bierly;* and that the said bonds were executed for payment of the purchase money due to *Jacob Staley* for the land sold by him to *F. Kemp*. That upon the bonds assigned to him, suit was brought, and judgment recovered. He admits the will of *Joseph Staley*, and he submits to the court the legal operation thereof. To the proceedings in the court of chancery he was not a party, although if his interests were to be affected by that suit, it was proper that he should have been a party. That *Jacob Staley* married a daughter of *F. Kemp*, and the land sold by *Jacob Staley* to *F. Kemp* was contiguous to the land on which *F. Kemp* lived. That *F. Kemp* could not be ignorant of the contents of *Joseph Staley's* will, or that *Jacob Staley* was bound to pay the legacies. That *Gilbert Kemp*, the other defendant, eldest son of *F. Kemp*, and the surety in the said bonds, acknowledged to this defendant that the whole family knew that the land was bound for the legacies, but calculated on *Jacob Staley's* paying them off as they became due, he being in good circumstances at that time. *G. Kemp* at the same time assured this defendant, that the bonds which this defendant held should be paid off punctually, and that the land was a good bargain if it was taxed with the payment of the legacies. That *F. Kemp* was bound to take notice of the charges on the land, the same being on record, &c. That *F. Kemp's* purchase included another tract of land called *The Country Seat*, which was not charged with the payment of the legacies, for the whole of which he gave £2700, and the amount of the legacies was £2000. He has no doubt but that the lands purchased were of greater value than the complainant states them to be, and he has always been willing to exonerate the estate of *F. Kemp* from all loss or responsibility, and proposed, in a letter to the complainant, who under the will of her husband is entitled to this land, that he would take the land bought of *Staley* by *F. Kemp*, and refund the money, with interest, which had been paid by *F. Kemp* or the complainant, and discharge the legacies for which the land was bound, on a deduction being made for the use of the farm since it had been in her possession; but the complainant refused to accede to the terms proposed. That at the time of the assignment of the bonds to him, he was ignorant of any dispute about them, or of any deduction being claimed from the amount thereof on any account whatever. That the assignments were made to him on the 13th of June 1812, and sometime before the death of *F. Kemp*, and with his knowledge, and who never pretended to claim that any deduction should be made from the bonds, but paid the same as they became due.

On motion of the complainant leave was given to her to file a supplemental bill. That bill stated, among other things, that the original bill referred to certain proceedings in the court of chancery on a bill filed by certain of the legatees against *Jacob Staley* and the complainant, which was then depending and undetermined. That the said suit had since been finally decided. The bill in that case was originally filed against *F. Kemp*, who answered it, and on his death a bill of revivor was filed, stating that he was dead, and that by his will he left "his wife *Dorothy* sole devisee and trustee or executrix of all his real and personal estate," and prayer that she might be summoned, &c. She appeared and answered, admitting that *F. Kemp* was dead, and that she was his executrix. Testimony was taken under a commission, and the chancellor decreed, that unless the defendants in that suit should pay to those complainants, viz. to *Michael Bruner* £100, with interest from the 17th of February 1809, and £100, with interest from the 17th of February 1810; to *George Bruner*, and *Susanna* his wife, £200, with interest from the 14th of April 1810; and to *Moses Staley* £200, with interest from the 11th of February 1815; the land in the proceedings mentioned devised to *Jacob Staley*, and sold by him to *F. Kemp*, be sold, &c. The supplemental bill further stated, that in order to prevent the said land from being sold according to the said decree, the complainant had been compelled to pay the said three legacies, with interest, and had paid the same, &c. The answer of *M'Pherson* to the supplemental bill stated, that he was not a party, although the complainant might have made him a party to the proceedings in the court of chancery referred to in the supplemental bill, if his interest was involved in that suit. The original and supplemental bills, (due publications having been made, &c.) were taken *pro confesso* as to *Jacob Staley*. Commission issued to take testimony, and testimony was taken and returned. The cause being submitted, SHRIVER, A. J. (March term 1824,) *Decreed*, that the injunction be dissolved, and the bill of complaint dismissed, with costs to M'*Pherson*, one of the defendants; and that *Jacob Staley* and *Gilbert Kemp*, the other defendants, each pay his own costs. From this decree the complainant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Palmer, for the Appellant. contended, 1. That the bonds assigned to Col. *M'Pherson* by *Jacob Staley* were subject to all the equity in his hands that they were liable to in the hands of *Staley*.

2. That the legacies specified in *Joseph Staley's* will were a charge on the land sold by *Jacob Staley* to *Frederick Kemp*, the appellants' testator.

3. That *Frederick Kemp* had an equitable claim against the bonds in the hands of *Jacob Staley*, the assignor, by reason of the said charge on the land.

4. That *Dorothy Kemp*, the appellant, as the devisee of *Frederick Kemp*, and the owner of the land, was entitled to all the equity which the devisor had in his lifetime, and was also entitled to the same relief against the bonds so assigned.

On the *first* point, he cited *Turton vs. Benson*, 1 *P. Wms.* 496. *Livingston vs Dean*, 2 *Johns. Ch. Rep.* 479. *Murray vs. Lylburn*, *Ibid* 441. *Steiner vs. Fell*, 1 *Dall. Rep.* 28. *Norton vs. Rose*, 2 *Wash. Rep.* 233. *Matthews vs. Wallwyn*, 4 *Ves.* 121. *Lloyd, Ex parte*, 17 *Ves.* 245; and *Davies vs. Austen*, 1 *Ves. jr.* 249.

On the *third* point, he cited *Sugd.* 345, (Ed. 1820.) *Newman vs. Rogers*, 4 *Bro. Ch. Rep.* 394. *Tourville vs. Naish*, 3 *P. Wms.* 306. *Frost vs. Beekman*, 1 *Johns. Ch. Rep.* 301. *Wigg vs. Wigg*, 1 *Atk.* 384. *Story vs. Lord Wind-*

sor, 2 *Atk.* 630. *Myddleton vs. Lord Kenyon*, 2 *Ves. jr.* 394. *Anonymous*, 2 *Freem.* 106, pl. 118. *Gilb. Eq. Ca.* 6. The answer states, that the complainant must resort to the covenant in the deed. Whether there was a covenant or not is of no consequence. *Sugd.* 345. But here there was no covenant of seizin; there is only a covenant against eviction. As to the effect of notice, he cited *Sugd.* 526. 2 *Eq. Ca. Ab.* 32. *Joy vs. Campbell*, 1 *Sch. & Lef.* 345. *Crofton vs. Ormsby*, 2 *Sch. & Lef.* 583. *Burkart vs. Bucker*, 2 *Binny*, 455; and *Davison vs. Waite*, 2 *Munf.* 527.

To show that one co-defendant may examine his co-defendant, and to show that *Gilbert Kemp* might have been examined, he cited 2 *Madd. Chan.* 315. *Murray vs. Shadwell*, 2 *Ves. & Beam.* 401. *Bellow vs. Russell*, 1 *Ball. & Beatty*, 99; and *Mayor and Aldermen of Colchester, vs.* ——, 1 *P. Wms.* 596.

On the *fourth* point he insisted, that although it appeared by the record that *Frederick Kemp's* will was executed before the deed to him from *Jacob Staley*, yet the will was executed after the deed; and the presumption was, that the will was incorrectly copied as to its date. But the fact that the land passed under the will, had been admitted, and was not in issue. To show that parol evidence is admitted to explain a will, he cited 1 *Phill. Evid.* 467. 3 *Stark. Evid.* 1047; and *Hall vs. Cazenove*, 4 *East*, 477.

Ross, for the Appellees. What estate did *Jacob Staley* take under the will of *Joseph Staley;* and what did the legatees take, and what were their remedies? *Jacob Staley* was not bound to accept of the devise to him, and he would not have done so unless he thought he would have been benefited by it. It was an estate given to him upon certain conditions. The legacies were not a charge upon the land devised to, but upon the person of *Jacob Staley*. If he had not accepted the devise, then the legacies would have been a charge upon the land. It was an equitable charge as to the legatees, but personal when accepted by *Jacob Staley*. There was no power of entry upon the land by the legatees; if there had been, then their legacies would have been a lien. It was a conditional devise at law, and nothing more than legacies given to the legatees. It was not a continued charge upon the estate, and not a legal lien; if it were the legatees might enter, or they might go into equity to have their legacies paid, but not otherwise. *Wigg vs. Wigg*, 1 *Atk.* 382, 383. *Glen vs. Fisher*, 6 *Johns. Ch. Rep.* 33, 34, 35. *Glen vs. Fisher's Adm'r. Ibid* 36. When the devisee accepted the land, he became personally bound; and if the land devised to him was not sufficient to pay the legacies, he was personally bound to pay them. The fund to which the legatees could resort, if the devisee had not accepted the devise to him, was to the extent of the land, and no further; and if the fund was not sufficient, they would lose their legacies to the extent of the deficiency. The legatees were not entitled to their legacies until particular periods; until then, it was a contingent interest in them, and on any of them dying, the legacy of such deceased would sink into the inheritance. *Prowse vs. Abingdon*, 1 *Atk.* 485. *Lowther vs. Condon*, 2 *Atk.* 133. *Richardson vs. Greese*, 3 *Atk.* 69. *Attorney General vs. Milner, Ibid* 112. The devisee became a trustee for the legatees, and as such he held the land. When *F. Kemp* purchased the property, he became a purchaser with notice, and stood in the place of *Jacob Staley*, and became a trustee, and made himself liable to the equitable results under the will. 2 *Fonbl.* 152. *Taylor vs. Stibbert*, 2 *Ves. jr.* 440. *Murray vs. Ballou*, 1 *Johns. Ch. Rep.* 575. *F. Kemp* being thus a trustee, he was bound to discharge all the duties he had assumed upon himself, which were to pay the legacies as they became due. A devise in trust to sell, or a charge made upon an estate, are similar, and the party takes it subject to the same rules. He is bound to see to the application of the money. *Sugd.* 368, 367, 371, 372. *Murray vs. Ballou*, 1 *Johns. Ch. Rep.* 575. *Ithell vs. Beane*, 1 *Ves.* 215. *Bailey vs. Ekins*, 7 *Ves.* 323. *F Kemp* took a covenant in his deed for a good title. An action of covenant may be brought on a warranty of title, although there has been no eviction. Any charge upon an estate is a defect of title. *Oglivie vs. Foljambe*, 3 *Meriv.* 64, 65. *Sugd.* 345.

As to the situation of *Kemp* in relation to *M'Pherson.* Where a bond is entered into, and the obligor has an equity, it must be provided for in the bond, or by way of endorsement.

The equity must appear upon the bond. Without such explanation it would be harmless in the hands of the obligee, but not so in the hands of an assignee. Who permitted these bonds to work an injury? It was *Kemp*. As a general rule the assignee of a bond takes it subject to all equity; but this rule has exceptions where an innocent party is to suffer. Here was an equity of which the assignee had no notice. If the obligor had an equity, and did not make it known, he waived it. A secret equity is that of which the party has no notice; it is in opposition to that equity which is on record, and of which the party has notice. *Kemp* paid some of the bonds to *Staley*, and he paid one of them to *M'Pherson*. If the bonds were the fund to pay the legacies, why pay any of them to *Staley?* *Kemp* has committed a breach of trust, and yet upon that breach of trust the equity is founded. If one of two innocent persons is to suffer, it must be him who occasions the loss. *Lickbarrow vs. Mason*, 2 *T. R.* 70. *Staley* committed a fraud, if the bonds are liable for the legacies; and it is *Kemp* who enabled him to do so by not placing the equity on the bonds. *Burke vs. Allen*, 3 *Yeates's Rep.* 351.

It has been alleged that the complainant is the devisee of *F. Kemp*. It is admitted that she is the devisee under the will exhibited, but not of the lands in question. It may be said that it is admitted in *M'Pherson's* answer that she is the devisee; if it be so, an admission of a fact is obligatory on the party, but an admission of a principle of law is not, because the court are to judge of it. *Pearce vs Grove*, 3 *Atk.* 523. *Jones vs. Smith*, 2 *Ves. jr.* 375. But there is no admission in the answer of such a fact; neither is there in the bill any allegation of her being the devisee of the particular lands, but generally that she is the devisee of *F. Kemp*. The bill is filed in the name of the complainant as executrix, and not as devisee of *F. Kemp;* and as an executrix she cannot have a decree of the court. She has nothing to do with the land—it belongs to the heirs of *F. Kemp*, and did not pass under his will.

The testimony proves that *F. Kemp* declared that he would pay the bonds. This shows the relative equities of the parties, and his understanding as to how he was situated in relation to these bonds, and his liability to the legacies, as well as to the bonds.

The deed from *Jacob Staley* to *F. Kemp* excepts out of it one acre and six perches, part of the land devised to *Jacob Staley* by *Joseph Staley*, which is stated in the deed to have been conveyed by *Jacob Staley* to *Peter Kemp*. It follows, therefore, that *Peter Kemp* ought to have been made a party, and so also ought Mrs. *Bierly*. Is *M'Pherson* to lose the debt due to him on the bonds, and *P. Kemp* to keep his land, and Mrs. *Bierly* to receive the amount of her bond? Is the complainant to be substituted in the place of the legatees? Her payment of the legacies was voluntary—it was made under an erroneous decree.

An assignee takes, subject to all equity, &c. but length of time, under particular circumstances, may alter the case. *Hill vs. Caillovel*, 1 *Ves.* 123. *Burke vs. Allen*, 3 *Yeates's Rep.* 351; and *Mayo vs. Giles*, 1 *Munf.* 537.

M*agruder*, on the same side. It is not denied that it was not known by Mrs. *Kemp*, and her counsel, that she was not devisee of the land in question. She does not ask relief as devisee, but that the personal estate should be exonerated from the payment of the bonds. She comes into court as executrix, not as devisee, and she does not state in her bill that she proved the will of her testator, &c. *Travis vs. Waters*, 1 *Johns. Ch. Rep.* 90. The answer of M'*Pherson* admits most of the facts. He states the grounds upon which he resists the claim, but he no where admits, nor is it charged in the bill, that the complainant was devisee of the land. There is no case where a purchaser can refuse to pay the purchase money while he refuses to give up the land purchased. *Abbot vs. Allen*, 2 *Johns. Ch. Rep.* 519. *Johnson vs. Gere*, *Ibid* 546. If *F. Kemp* could have been relieved, the complainant cannot, even if she was devisee, and had come into court as devisee. The complainant has selected one particular bond, against which she asks to be relieved. Suppose the land had been sold to seven different persons—all the land sold should contribute. *Stevens vs. Cooper*, 1 *Johns. Ch. Rep.* 425. All parties who have an interest in the subject matter should be brought before the court.

Mrs. *Bierly* and *P. Kemp* should have been made parties. But by selecting one of the bonds assigned to M'*Pherson*, that is to be made liable to pay all the legacies.

It is not stated that *F. Kemp* died seized of the land, or that he devised it to the complainant. Nor is there any such admission in the answer. If she, as executrix, has paid the legacies, she paid them in her own wrong, and has been guilty of a *devastavit*. 1. If the bond had remained in the possession of *Jacob Staley*, what equity could be set up against it? 2. What is the effect of the assignment to Col. M'*Pherson?* 3. What effect will time and circumstances have in the case against the equity set up?

1. The land was liable to pay the legacies, and the devisee had no right to withdraw a part of it. The contract is *Staley's* deed. It was completed, and possession of the land delivered. The purchase money was secured by bonds. A purchaser of land buys it at his peril. He is bound to examine and to find out if there are any incumbrances. *Murray vs. Ballou*, 1 *Johns. Ch. Rep.* 566. *Chesterman vs. Gardner*, 5 *Johns. Ch. Rep.* 29. *Gouverneur vs. Elmendorf*, *Ibid* 79. It is no where charged in the bill that *Staley* had been guilty of a fraud or misrepresentation. There was no concealment by *Staley*, because the deed to *F. Kemp* refers to *Joseph Staley's* will. It was the duty of *Kemp* to examine into the title. He was bound to know of the legacies, and of their being a charge upon the land. If he did not intend to pay the legacies, he should have secured himself against their payment. *Caveat Emptor* is the maxim. But giving the lands, he has no right to say they should not be paid. If there had been an agreement with *Staley* that he was to pay the legacies, then in a suit brought on any of the bonds for *Staley's* use, the agreement might be set up; but that could not be done in a suit on any of the bonds for the use of another. The authorities, where the purchaser may retain the purchase money on account of incumbrances, &c. and where incumbrances on the estate do not affect the title, &c. are *Sudg.* 312, 315, 195, 165. *Waring vs. Ward*, 7 *Ves.* 337.

2. The assignee paying a valuable consideration stands in a different situation from that of the assignor. If *F. Kemp* had

any claim against the bonds, he was guilty of fraud in concealing it from the assignee. This is admitting that there was an agreement between *Staley* and *Kemp*, that the latter should not be liable for the legacies. The assignee was not bound to know the consideration of the bonds. There was nothing stated in them by which it could be known that there was to be any set off against them by the obligor. The only inquiry necessary for the assignee to make of the obligor was, whether any payments had been made which were not credited. An obligor well knows that the obligee may dispose of the bond; and if he had any equitable claim against it, he should insist on its being inserted in the bond, or endorsed on it.

3. *F. Kemp*, with a full knowledge of all the circumstances, executed the bonds, and paid some of them as they became due. His declarations that the bonds must be paid, are in proof.

Taney, in reply. The complainant, in the introductory part of the bill, need not state the character in which he sues, if it is sufficiently averred in the bill so as to show the right in which he claims relief. The case of *Travis vs. Waters*, 1 *Johns. Ch. Rep.* 90, does not militate against this principle. There it was said that there was no averment that the complainant showed her character as executrix. It was a bill of revivor, where she was attempting to identify herself with the original complainant. A devisee is considered as an alienee; and a bill by an alienee need not, in the introductory part, state that he is alienee Here the averment in the bill is that *F. Kemp* was dead, having made the complainant his devisee and executrix. But it is said it is not averred that she is the devisee of this particular land. She has said that she is the devisee, which not being denied, it is to be presumed that she is the sole devisee. As if it was said that she was executrix, the presumption would be that she was sole executrix. *Kemp* had no other land than that in question. His will is exhibited, showing the complainant to be his sole devisee. But it being alleged in the bill that she is the devisee of *F. Kemp*, and the answer admitting that she is entitled to the land under the will of her husband, can you go out of the bill and answer to ascertain whether or not she is the devisee of the land? The will exhibited is in conformity with the bill and answer. If the answer had denied her being the devisee of the land, she might have proved the fact that the will was executed after the deed from *Jacob Staley* to *F Kemp*. But it is not denied; the fact is therefore admitted, and she need not prove it. Suppose she had averred herself to be the heir at law, and it was admitted by the answer, would it not be conclusive on the parties that she was heir at law?

It is insisted that the proper parties are not before the court. All persons interested in the question are made parties. *Cromwell, et al. vs. Owings*, 6 *Harr. & Johns.* 14. P. *Kemp* had no interest in the result of the suit. It is not a question of contribution; but whether the complainant may apply the fund to exonerate the land. The bond assigned to Mrs. *Bierly* will not be affected by the decision in this case.

As to the real and relative equity. There was none against *Jacob Staley*. As between the vendor and vendee, it is proved that the land was sold for its full value, and the bonds given without a reference to the lien, relying on *Staley* for raising the incumbrance. There is a clear distinction, between a defect of title, and an incumbrance. *Sugd.* 195. Where an incumbrance is discovered, and the purchase money has not been paid, the purchaser may apply the purchase money to the extinction of the incumbrance. But where there is a defect in the title, a court of equity will not interfere. Recourse must be had to a court of common law. Where the incumbrance is a part of the estate, as a rent, then the vendee is bound to discharge it. *Sugd.* 24. *Tweddell vs. Tweddell*, 2 *Bro. Ch. Rep.* 152. *Waring vs. Ward*, 7 *Ves.* 337. These decisions go upon the meaning of the parties as collected from the contract and the nature of the estate sold. Here the contract was, that the incumbrance was to be discharged by the vendor and by the vendee. Col. M'*Pherson* was bound to know that the bonds were for the purchase money of the land devised and charged with the legacies. He stands in the situation of the obligee, and was bound to call on the obligor and obtain information; and if he did not, he is to be charged in the same manner as the obligee would be if he sought to enforce payment. An assignee takes the bond subject to all equity in the hands of the obligee. *Mayo vs. Giles*, 1 *Munf.* 536, per *Tucker*, J. Here M'*Pherson's* equity is inferior to that of the vendee, but it is good against the vendor. This is the secret equity referred to in the books *Burke vs. Allen*, 3 *Yeates*, 354. But it is alleged that *F Kemp* promised to pay the bonds. There is no such ground relied on in the answer. What was the promise? Look at the testimony. It was an extorted promise, such as it was, from a poor desponding old man, easily alarmed. It has been said that the purchaser must give up the land before he can claim to be released from the purchase money, and *Johnson vs. Gere*, 2 *Johns. Ch. Rep.* 546, has been cited. In that case there was a defect of title. So also in *Abbott vs. Allen*, *Ibid* 519, there was an outstanding title which it was alleged might be brought against the land; and the Lord Chancellor said he should not set up a doubtful title to prevent the payment of the purchase money. The complainant was not bound to give up the land on the proposition made by M'*Pherson*. The admissions of *Gilbert Kemp* cannot bind *F. Kemp*. The answer of one defendant is not evidence in favour of his co-defendant.

The covenant in the deed is not a covenant against incumbrances; it is a general warranty as to the title, and is not broken until eviction. It is not like a covenant of seisin. *Greenby vs. Wilcocks*, 2 *Johns. Rep.* 1. *Folliard vs. Wallace*, *Ibid* 395. *Kent vs. Welch*, 7 *Johns. Rep.* 258. *Sedwick vs. Hellenback*, *Ibid* 376; and *Vanderkarr vs. Vanderkarr*, 11 *Johns. Rep.* 122.

Martin, J. delivered the opinion of the Court. *Joseph Staley* by his last will and testament, among other things, devised his dwelling plantation to his son *Jacob*, charged with the payment of £2,000, in legacies to ten of his children. *Jacob* sold this land to *Frederick Kemp* for £2,700, and executed a deed to him for the same. Part of the purchase money was paid at the time of the deed, and bonds were given for the residue. Some of those bonds were paid by *Kemp* to *Staley*, and three of them were sold and assigned by *Staley* to M'*Pherson*, and one to Mrs. *Bierly*. One of the bonds assigned to M'*Pherson* was paid by *Kemp* when it became due, and a suit was commenced on another against *Dorothy Kemp*, executrix of *Frederick Kemp*, and judgment obtained against her. This bill was filed to obtain an injunction to stay proceedings on that judgment, because the land sold by *Staley* to *Kemp* was charged with these legacies, and the payment of the purchase money ought not to be enforced until it was freed from the incumbrance. The bill states that *Frederick Kemp* is dead, having first made his last will and testament, and appointed the complainant his executrix and devisee. The will of *Frederick Kemp*, and the deed from *Jacob Staley* to him, are both filed as exhibits by the complainant.

The first objection relied on in the argument was the want of proper parties. That the land sold to *Kemp* did not pass by his will, but descended to his children as his heirs at law, and that they ought to have been complainants in the cause.

If Mrs. *Kemp* is entitled to an injunction, it must be *as the devisee* of the land charged with the payment of these legacies. It is a settled principle of law, that a will can transfer no land, unless the testator was entitled to it, at the time he executed his will. This will bears date the 4th of February 1808, and the deed was executed on the 19th of February 1810. The date of the will is *prima facie* evidence of the time it was executed, and no attempt is made to prove its execution at any other time. It therefore appears from the exhibits of *the complainant herself*, that the deed was executed more than two years after the date of the will. But it is said this fact was not in issue—that it was admitted by the respondent, and cannot now be enquired into. The bill states in general terms, that the complainant was the executrix and *devisee* of *Frederick Kemp*, and the answer admits "that the complainant is entitled to this land *under the will* of her husband." Whether this admission would preclude the respondent from availing himself of the facts, as proved by the *complainant*, would be a question of importance, and would receive the attention of the court, if upon the merits of the case it appeared the appellant was entitled to relief against the judgment. The court, however, have formed a different opinion. They think the decree of the court below is correct, upon the merits of the case, and it is therefore unnecessary to inquire who ought to have been made complainants.

Suppose the appellant to be the devisee of this land under the will of her husband, is she entitled to the relief prayed for in the bill?

The land was certainly charged with the legacies; and, whether in the hands of *Staley*, the devisee of his father, or of *Kemp*, the purchaser, was liable for the payment of them. Does *M'Pherson*, the assignee of *Staley*, stand in a better situation than his assignor? If he does, it must arise from other circumstances than the mere assignment; for as a *general* rule no position is better established than that the assignee stands in the shoes of the assignor, and takes the claim, subject to all the equity it possessed in his hands. Yet it appears there are exceptions to this rule, and circumstances may place the assignee in a better predicament than his assignor. The conduct of the obligor may change the relation that before existed between him and the assignee, and deprive him of an equity he had against the assignor. In *Sugden's Law of Vendors*, 482, it is stated—"It may be laid down as a general rule, that a purchaser of a chose in action, or of an equitable title, must always abide the case of the person from whom he buys—And yet there may be a case in which a purchaser, merely by sustaining that character, will be in a better situation than the person of whom he bought."

In *Norton vs. Rose*, 2 *Wash. Rep.* 251, Judge *Roane* says, "although I am clear in the opinion that an equity existing against a bond, is not lost or extinguished by an assignment for a valuable consideration, and without notice, yet it may be lost by length of time, *or other circumstances.*" The same doctrine was established in the case of *Buckner & others, trustees of Beverly, vs. Smith, Stubblefield & others*, in 1 *Wash. Rep.* 296. *Beverly*, when under age, lost a considerable quantity of tobacco, at unlawful gaming with *Smith*, who for a valuable consideration gave an order on him to *Stubblefield*. *Beverly* accepted the order, and gave his bond to *Stubblefield* for the amount. *Stubblefield* assigned the bond to *Graham*, and *Graham* to *Dixon*, each paying for the same a valuable consideration. *Beverly promised Dixon to pay him*, and confessed judgment in an action brought on the bond. Judge *Lyons*, in delivering the opinion of the court, after stating that the *assumpsit* of *Beverly* to *Dixon* was after he came of age, said—"It is in general true, that the assignee of a bond of this sort can be in no better situation than the obligee, but this case is very different, and the difference is produced by the conduct of *Beverly*, who by his assurances of payment induced *Dixon* to receive an assignment of it. He not only concealed from him the objections to the bond, but afterwards assumed to pay it." In the case of *Hoomes, Executor of Elliott, vs. Smoot*, 2 *Wash. Rep.* 392, it is declared by the court, "that all bonds given for a gaming consideration are void as between the parties, and it is equally true that the assignee cannot stand in a better situation than the obligee, unless there be some particular circumstances in his favour, independent of the mere assignment. But if an innocent man shall be induced to become the purchaser of such a bond by the obligor, it is a *deceit* upon him, and he ought not to be subject to the same equity to which the obligor was entitled against the obligee." 'Tis true, in those two last cases it is stated, the conduct of the obligor induced the assignment. But that, it is conceived, can make no difference. The *gist* of these decisions is, that it was a *deceit* upon the assignee—it lulled him into a false security, and by inducing him to believe the bond would be paid by the obligor, in the one case made him take an assignment, and in the other prevented him from looking to the assignor for redress. It is not the time, but the *effect* of this conduct, that is to be regarded. He who asks equity, must be prepared to do equity; and an obligor, who with a knowledge of the whole transaction, promises to pay the assignee, cannot be favoured in a court of chancery against his solemn engagement.

Let us for a moment look into the evidence in the record, and see if there are such circumstances as would take this case out of the general rule.

It cannot be doubted that *Frederick Kemp* knew those legacies were a charge upon the land he purchased of *Staley*. He had both constructive and positive notice of it. In the deed of *Staley* to him, it is expressly stated, that *Staley* was entitled to the land conveyed, by the last will and testament of his deceased father. And Mrs. *Kemp*, in the presence of her husband, and uncontradicted by him, declared "the will was on the table at the time the bonds were executed."

These bonds were to be paid at different, and some of them at distant periods; and yet *Kemp*, with a knowledge of the incumbrance, ushers them into the world without any intimation on the face of them that they were liable to a charge. This is certainly a concealed equity, and although not of itself sufficient to change the relation of the assignee, is a strong circumstance, with others, to rebut the equity set up against these bonds.

At the time the deed was executed, part of the purchase money was paid, and *Kemp* being indisposed, several bonds were executed by his wife and son for the balance; these bonds were regularly paid to *Staley* as they became due; and in 1811, *Kemp* having recovered his health, the bonds then remaining in the hands of *Staley* were cancelled, and four others were executed by *Kemp*, with his son as security for the amount of them. Were not these circumstances (without the aid of any declarations by *Kemp*,) calculated to convey the impression that *Kemp* would pay to *Staley* these bonds as they became due, under a confidence that *Staley* would discharge the legacies; and is not the testimony conclusive that such was his impression? *Staley* was his son-in-law, and he was disposed to favour him. He says, "he trusted *Staley* because he made such fair promises that he would pay the legacies," and regrets that he turned out a worthless fellow, and had deceived him; and in two conversations, when Mrs. *Bierly* called on him relative to these bonds, first at the room of *Mary Kemp*, he told her she was safe in taking one of them—that he would pay those bonds, although he should lose by *Jacob Staley;* and afterwards, at his own house, made the same promise, and again complained of his misplaced confidence in *Staley*.

Is it not evident, if *Frederick Kemp* had lived, he would have never set up this defence against the bonds in the hands of the assignees? One of them became due in his lifetime, and without making any objection, he paid it to *M'Pherson;* and his subsequent conduct and promises clearly prove it was his intention to pay them. He had no equity to be relieved against the payment of these bonds, and of course his devisee could derive none from him. DECREE AFFIRMED.

LAURENSON *vs.* THE STATE, use of THE LEVY COURT, &c.—June, 1826.

K was appointed a collector of taxes under the act of 1794, *ch.* 53, and gave bond, with security as such, and proceeded to collect. In an action of *debt* on the bond against L, one of the sureties, to recover such collections—*Held*, that it was not competent for L to defend himself upon the ground that K had not taken the oath prescribed by law. That as K was regularly appointed collector, and bonded and acted as such, he was to be presumed to have complied with all other necessary qualifications; that in an action against him he could not defend himself upon the ground of his own neglect, and that his securities, in relation to such a defence, were in point of law, in the same situation.

In an action of *debt* on a bond with a collateral condition, breaches must be assigned; but where there was an agreement that the defendant should plead *nil debet*, and that he should, on the issues on that plea, give in evidence all matters which he could give under any power of pleading which could be legally used—*Held*, that although it was a loose mode of proceeding it would be sanctioned, and that its true meaning was to waive *on both sides* all errors in the pleadings, and to dispense with the necessity of the plaintiff's assigning breaches.

APPEAL from *Baltimore* County Court. This was an action of debt on a collector's bond, executed to the state on the 18th of December 1819, by *Charles Keenan*, *Hugh Sweeny*, *Philip Laurenson*, the defendant, (now appellant,) and *Neal M'Fadon*, reciting that *Keenan* had been appointed by the levy court for *Baltimore* county, collector of the county rate or assessment for the year 1819, imposed by the said court on all the property in that part of the city of *Baltimore*, comprising the 1st, 10th, and 11th wards of the said city, and conditioned, "that if the above bound *Charles Keenan* shall faithfully discharge his duties as collector of the tax for the first, tenth, and eleventh wards of the city aforesaid, then," &c. It was agreed by the counsel of the parties in the several actions depending on the same bond against the sureties, "that the defendants in these cases shall plead *nil debet*, and that on the trial of the issues on that plea they shall severally be entitled to make all such legal objections, and give all kinds of evidence, which they could be entitled to make or give by or under any mode or form of pleas or pleading which could be legally used." The defendant then pleaded *nil debet*, and issue was joined.

At the trial the plaintiff gave in evidence the assessment and appointment made by the justices of the levy court for *Balti-*

more county, for whose use this suit is prosecuted, and among others, that of *Charles Keenan* as collector of the assessment and tax imposed on property in the 1st, 10th, and 11th wards of the city of *Baltimore*, authorising him to collect from the owners of property assessed in the said wards, at the rate or sum of one dollar on every hundred dollars so assessed. He also gave in evidence the bond entered into by *Keenan*, as before mentioned, which was proved by the subscribing witnesses thereto, on the 18th of December 1819, and the approval thereof, and order for its being recorded, and of its being recorded on the same day among the records of *Baltimore* county court by *William Gibson* clerk. He further gave in evidence the following paper or statement, the signature to which was admitted to be in the handwriting of *Charles Keenan*, the principal obligor in the said bond, viz. "Amount of the assessment of property in the old first, tenth, and eleventh wards of the city of *Baltimore*, on which the county levy has been laid in the year 1819, and to be collected by *Charles Keenan*, appointed collector of the same; and also a statement of the amount of property in the tenth and eleventh (old) wards, on which the sum of seven hundred and fourteen dollars and seventy-one cents is to be collected, towards defraying the expenses of the commissioners, surveying, &c. of the said property, for excluding the same from the direct tax of the city, viz.

First Ward,	$595,058	
Tenth Ward,	550,639	
Eleventh Ward,	515,643	
	$1,661,340 at 53 cents per $100,	$8,805 10
Excluding direct tax 10th Ward,	$210,727	
Ditto 11th Ward,	209,690	
	$420,417 at 17 cents per $100,	714 71
		$9,519 81

I, Charles Keenan, being appointed by the justices of the levy court for *Baltimore* county, collector as above stated, have received the books containing the alphabetical lists of the persons names in each of the said wards, with the amount of each person's assignment annexed. The whole amount to be collected, according to the above statement, including my commission at six per cent. nine thousand five hundred and nineteen dollars and eighty-one cents. In witness whereof, I have set my hand in the city of *Baltimore,* this eighteenth day of December 1819. *Chas. Keenan.*

Witness, *Robert Walsh.*"

It was admitted that *William Gibson* was, on the 18th of December 1819, and continued to be, the clerk of *Baltimore* county court. The defendant then gave in evidence, that the said *Keenan* was born in *Ireland,* and had not been naturalized in this country, but had been living in the city of *Baltimore* from the end of the year 1815; and then prayed the opinion of the court to the jury, that the plaintiff was not entitled to recover. Which opinion the Court, [*Archer,* Ch. J. and *Hanson* and *Ward,* A. J.] refused to give. The defendant excepted. Verdict for the plaintiff, and damages assessed to $517 76. Judgment for the plaintiff on the verdict for the debt, (the penalty of the bond,) and costs. The defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

Raymond and *R. Johnson,* for the Appellant. 1. The person appointed collector was an alien, and did not make the declaration, or take the oath prescribed by the act of 1794, *ch.* 53, *s.* 2, to be taken by a collector, and that therefore the appellant, being a surety, was not liable on the bond. 2. No breaches were suggested by the plaintiff in pursuance of the statute. 3. The copy of the bond offered in evidence was not properly certified. 4. It does not appear that *Keenan* was appointed collector, and authorised to collect the tax imposed, nor was it proved that he did collect it, or any part of it. 5. The agreement entered into by the counsel of the parties, was only that the *defendant* might be placed in the same situation as if he had pleaded performance, &c. It does not authorise the plaintiff to do that which could not be done without the agreement. It was not intended to benefit the plaintiff, but solely for the benefit of the defendant. The plaintiff was therefore bound to assign the breaches. *Wilmer vs. Harris*, 5 *Harr. & Johns.* 1. *Van Benthuysen vs. De Witt.* 4 *Johns. Rep.* 213. *Munro vs. Alaire*, 2 *Caine's Rep.* 329. *Drage vs. Brand*, 2 *Wils.* 377. *Hardy vs. Bern.* 5 *T. R.* 636. If issue is joined on the plea of *nil debet*, the defendant will thereby be let into any defence he has it in his power to prove. 1 *Wheaton's Selw. N. P.* 435; and *Rawlins vs. Danvers*, 5 *Esp. Rep.* 38.

Williams, (District Attorney of *U. S.)* and *Gill*, for the Appellee. 1. The *agreement* as to the pleadings was manifestly drawn by the defendant's counsel below, and it cannot be supposed that it was not intended to give the same latitude to the plaintiff, that it accorded to the defendant. It is in substance a *case stated*, and ought so to be construed. 2. The pleadings are perfectly correct; and the verdict was given under the act of 1785, *ch.* 80, *s.* 13. *Nil debet* is not a good plea to a bond; whether demurred to or not. *Roberts vs. Mariett*, 2 *Saund.* 187 a, *(note 2.) Bullis vs. Giddens*, 8 *Johns. Rep.* 82. *Smith vs. Jansen, Ibid* 111. Nor is *non infregit conventionem*, nor *non damnificatus*. If such a plea is agreed to be received with leave, it dispenses with all further pleadings, except the *similiter*. The leave can only be so construed. No breaches can with propriety then be suggested, nor a special replication to a plea of *nil debet* be put in—*Cutler vs. Southern*, 1 *Saund.* 117, *(note 1.)* 1 *Chitty's Plead.* 478. So with the pleas of *non infregit conventionem*, and *non damnificatus*, 1 *Saund.* 117, *(note 1.) Brent vs. Davis*, 10 *Wheat.* 396. *Corporation of Washington vs. Young, Ibid* 406. *Rawlins vs. Danvers*, 5 *Esp. Rep.* 38. No case can be found in any book of pleadings, or elsewhere, that breaches were ever assigned after a plea of *nil debet* had been put in with leave. Under such a plea there can be no oyer. 2 *Harr. Ent.* 549. To the other pleas there is oyer, which becomes a part of the declaration. *Arch. Dig.* 187. 3. Even if it fully appeared that the collector had not taken the oath, or made the declaration required, it is no defence in a suit against him or his sureties. It would prevent his sustaining a suit as plaintiff, but he cannot be permitted to set up his own *disqualification;* or to use his own delinquency and breach of duty to resist payment of what he has by virtue of his office become possessed of. So far as the *rights of others* are concerned, he is what he professed to be, a legally constituted officer. 16 *Vin. Ab.* tit. *Officers & Offices,* (G 4,) 114. *Harris vs. Jays, Cro. Eliz.* 699. 5 *Bac. Ab.* tit. *Offices & Officers,* 190. *Ipsley vs. Turks,* 2 *Mod.* 193. *Big. Dig.* 441. *The People vs. Collins,* 7 *Johns. Rep.* 549. *M'Instry vs. Tanner,* 9 *Johns. Rep.* 135. 4. It does not appear whether *Keenan* took the oath or made the declaration, or not. His not being a citizen of the *U. S.* is no proof that he did not take such oath. In the absence of all evidence the *presumption* is he did what his duty required of him. At least where he is called upon, he is to answer for his delinquency. The levy court did their duty. If it is proved he acted as collector, his appointment need not be proved. *Arch. Dig.* 388. *Aldersen vs. Clay,* 1 *Starkie's Rep.* 405. *Green vs. Jackson, Peake's N. P.* 236. 1 *Phill. Evid.* 170. 5. The *onus probandi* as to this fact, although a negative, rests on the defendant. 1 *Starkie's Evid.* 377, 378. *Borthwick vs. Carruthers,* 1 *T. R.* 648; and *Dickson vs. Evans,* 6 *T. R.* 57.

Martin, J. delivered the opinion of the Court. The defence in this case cannot be sustained. It would be contrary to every principle of law to allow a man to avail himself of his own wrong, and plead a breach of duty as an excuse for a gross fraud upon the public.

Keenan being regularly appointed collector under the act of 1794, *ch.* 53, having given bond, with security, for the faithful performance of his duty, and received from the levy court the necessary books to make his collection, will be presumed to have taken the oath prescribed by law, as a prerequisite to the performance of his official duties. It cannot be for him to say, a suit on this bond shall be defeated by his own neglect or malfeasance.

The securities, *in point of law,* must be placed in the same predicament. They have engaged that *Keenan* shall faithfully discharge his duty as collector, part of that duty was to take the oath prescribed by law, to enable him to make his collection, and they cannot be allowed, (in this respect,) a defence that is denied to the principal.

The appellant has also relied on errors in the pleadings—that this is an action on a bond with a collateral condition, and no breaches are assigned. This is fatal, unless cured by the agreement filed by the parties. By a paper signed by the counsel on both sides, it was agreed, in the several actions depending on the same bond against the sureties in the county court, "that the defendants in these cases shall plead *nil debet*, and that on the trial of the issues on that plea *they* shall severally be entitled to make all such legal objections, and give all kinds of evidence, which they could be entitled to make or give by or under any mode or form of pleas or pleading which could be legally used."

Whether the court are bound by a strict grammatical construction of this agreement, or may be permitted to look into the circumstances that gave rise to it to ascertain its true character, is the only difficulty presented by it. It is certainly a very loose course of proceeding, and the court cannot but express their regret, that instead of regular pleadings in the case, they are required to act on a substitute not free from ambiguity. and upon which the counsel cannot agree. See the case of *Orme vs. Lodge*, 3 *Harr.* & *Johns.* 83.

The court are of opinion, that this agreement ought to receive a liberal construction, to carry into effect what appears to have been the intention of the parties, and not one to defeat the plaintiff, whatever might have been the merits of his case. It is considered an agreement to waive *all errors in the pleadings*, and that instead of proceeding in the regular course, by praying oyer of the bond, pleading performance and assigning breaches, that the plea of *nil debet* shall be received, and under that plea the cause should be tried, as if all the pleadings had been regular. In this view of it, it would not be injurious to either party; its only effect would be to save trouble in pleading, and the merits of the case would come fairly before the jury.

If this was not intended to be its effect, it is difficult to conceive why the defendant did not avail himself of it in the court below. Both parties proceeded to the trial of the cause, under this state of the pleadings, and that affords strong evidence, that the agreement was considered as a *waiver of errors*.

JUDGMENT AFFIRMED.

Dorsey *vs.* Smith.—June, 1826.

A, by will, devised his real estate to his wife S for life, and after her death to his brother C, in fee, charged with the payment of £500 to each of his two sisters, to be paid in one year after C took possession of the estate. After the death of A, his widow S, the tenant for life, married D in 1812. In 1814 D entered into a written contract with C, the remainder-man, by which C agreed to sell him all his interest in the estate for $10,000, payable in three equal annual payments, the first to be paid the 25th December in the same year, and all, except $2,800 bearing interest till paid. D was to give bond, with security, for the payment of the purchase money in manner before mentioned, and on payment thereof, C was to execute a conveyance of the land to D in fee. Endorsed on this contract was this agreement—"It is understood that the legacies, charged by the will of A, to be paid out of his real estate, are not to be satisfied by D, but that the land is to be exonerated by C, from the payment thereof" The first instalment under the contract was paid by D, and bond with security given for the balance. On this bond judgment was rendered at law against D, one of the legacies charged upon the estate being still outstanding, and the other having been purchased by D. A bill was then filed by D, praying an injunction to stay proceedings on the judgment. After the filing of the bill, the outstanding legacy was purchased by C.

Held, 1. That the true construction of the agreement endorsed on the contract of purchase between D & C, was that the estate itself was to be freed from all liability to pay the legacies with which it was charged, and not merely that D was to be personally indemnified from their payment; and that though it was an agreement which C might have some difficulty in complying with, it was not an impossible one, and that he was bound to perform it before he could call on D for the whole purchase money.

Held, 2. That as the money was to be paid in instalments, and the said agreement was in general terms that the land was to be exonerated from the outstanding legacies, C had, *until the last instalment became due*, to comply with the agreement; and that therefore, upon the instalments, which fell due before that time, D was bound to pay interest, although the legacies were not discharged, having by his contract expressly agreed to pay interest. That D could not have relieved himself from the payment of this interest unless he had actually tendered the amount due.

Held, 3. That upon the last instalment interest could not be charged for the whole time, as the legacies were still outstanding, and C refused to exonerate the bond from their payment, supposing that he was not bound to do so, but merely to give D a personal indemnity against them. That it would however be otherwise, and interest might be charged, if D could be considered as having taken possession under his purchase, or to have been in the reception of the rents and profits of the estate sold.

Held, 4. That D was to be considered as only the purchaser of a dry remainder, there being a tenant for life in possession.

Held, 5. That the wearing out of a life-estate, in a case of this kind, is not, as a general rule, equivalent to the taking of the profits so as to charge the purchaser of the remainder with interest, unless the purchaser has *himself been in default*, and the delay in the completion of the contract has been owing to such default.

Held, 6. That when C purchased one of the legacies he was entitled to a part of the last instalment, and to interest upon it, from the time of such purchase.

Held, 7. When an instrumentary witness resides out of the jurisdiction of the court, so as not to be amenable to its process, or cannot be found after diligent enquiry, the proof of his hand-writing is evidence of every thing on the face of the instrument.

Held, 8. That D was not entitled to be credited for the legacy bought in by him, with what he paid for it, but only with its fair value at the date of the purchase; and that that value was to be estimated by analogy to the rule adopted in the court of chancery in this state, for ascertaining a woman's allowance in lieu of dower in land sold under a decree of that court, and not by a reference to *Dr. Halley's* table of observations.

Held, 9. That each party, being in some respects in default, was to pay his own costs in the court of chancery.

Appeal from a decree of the Court of Chancery. The facts of this case are sufficiently stated in the final decree of the chancellor. The bill, which was filed by the appellant, (and *S. Chapman* his surety, who is since dead,) against the appellee, on the 20th of December 1819, prayed an injunction to stay proceedings on judgments at law obtained by the appellee against the appellant, and his surety. The injunction was granted, and on a motion to dissolve it, on the coming in of the answer, the following decretal order was passed at July term, 1820, by

Kilty, Chancellor. The motion to dissolve the injunction in this case, was fully argued at the present term, and the proceedings have been considered. The rule recognized in the case of *Colegate vs. Lynch*, 2 *Harr. & Johns.* 34, which was referred to, is considered a proper one, and has been since acted on; but it might be oppressive where the sum was small, and the party to be affected by it not in fault. In this case the credit claimed was $300, but it appears that $257 were credited, leaving only $43 to be further allowed, and it is not stated that *Smith* was called on to correct the mistake. There is, however, no occasion to rely on that rule, it being clear that the answer, and the exhibit referred to, do not constitute such a denial of the equity of the bill, as to entitle the defendant to a dissolution of the injunction. The equity of the bill arises on the agreement in writing exhibited, and more particularly on the addition thereto respecting the legacies. The court is not called on at this time to decide finally on the means by which the land is to be exonerated; but as the legacies are not to be satisfied by *C. Dorsey*, it would seem that he ought to be secured from the risk of his being hereafter obliged to satisfy them, even though he might eventually be repaid; and on this question the answer of the defendant, although taken as true in respect to the facts, cannot extend to change the terms of the written agreement, or to establish its legal meaning and construction.

Commissions afterwards issued to take testimony, which was taken, and the cause set down for hearing, and then referred to the auditor to state and audit the accounts. On the coming in of the auditor's report, the following decree was pronounced by

JOHNSON, Chancellor, (March term 1824.) *Henry A. Smith*, by his last will, dated the 17th of July 1802, devised to his wife *Dicandia Smith*, "during her life, all the land whereon I now live, near and adjoining *Benedict Leonard Town*, in *Charles* county." To each of his two sisters he bequeathed £175, and directed that so much of his personal property, as should be necessary, should be sold for the purpose of paying those legacies. To his wife, charged with the legacies, he gave all his personal property. The remainder, after the death of his wife, in the land devised to her for life, he gave to his brother *Charles S. Smith*, the defendant, in fee, charged with the payment of the sum of £500 to each of his two sisters, *Margaret*, and *Mary Wheatley*, to be paid "in one year after my brother enter into the possession of the above land;" that is, in one year after the death of his wife, to whom the life-estate was given. On the death of the testator his widow possessed the property, and in the year 1812 intermarried with *Clement Dorsey*, one of the complainants.

On the 13th of March 1814, *Dorsey* entered into a contract with *Smith* for the purchase of his remainder in the land, inaccurately termed his "reversionary interest." By the agreement in writing signed by the parties, *Smith* "sells, and hereby agrees to sell unto the said *Clement Dorsey*, and his heirs, all his *reversionary interest*, (being a fee simple in and to that tract or parcel of land devised by a certain *Henry A. Smith*, lately deceased, to his wife *Dicandia Smith*, now *Dorsey*,) to and for the price of ten thousand dollars, payable in three equal annual payments; the first whereof to be paid on the 25th of December in the present year, and all of which money, except the sum of two thousand eight hundred dollars, bearing an interest from the date hereof till paid; and upon payment of which said purchase money, with the interest, the said *Smith* or his heirs, is to execute to said *Dorsey* a deed or release in fee simple; and the said *Dorsey* agrees to pay him the said money, with interest thereon as aforesaid; and further to execute to the said *Smith*, with *Philip Stuart*, or such security as *Smith* shall approve, a bond conditioned for the payment of the money as aforesaid, with interest thereon as aforesaid." On the agreement is the following endorsement signed by *Dorsey* and *Smith:* "It is understood that the legacies charged by the will of *Henry A. Smith* to be paid out of his real estate, are not to be satisfied by *C. Dorsey*, but that the land is to be exonerated by *Charles S. Smith* from the payment thereof." The controversy between the parties principally arises from this endorsement. The first instalment was paid.

On the 23d of March 1815, in pursuance of the stipulation that bond with approved security should be given for the purchase money, *Dorsey*, together with *Samuel Chapman*, the other complainant, executed a bond to *Smith*, conditioned to pay the sum of $6,666⅔ as follows: $3,333⅓, with legal interest on the sum of $4,888 89, from the 25th of December 1814, on or before the 25th of December 1815; and the further sum of $3,333⅓, being the residue thereof, with interest on $2,444 44, from the 25th of December 1815, on or before the 25th of December 1816.

In the very commencement of the dealing between *Dorsey* and *Smith*, the instruments of writing, intended to meet the engagements of the parties, appear so inaccurately or hastily drawn, that there is nothing surprising in finding a difference of opinion as to their true character and effect. In the original agreement, instead of stipulating that all the money, except the

the sum of $2,666⅔, (that being the £1000 legacies charged on the land,) bearing an interest from the date of the agreement, the whole, except the sum of $2,800, is to bear interest—a plain and manifest mistake. And the bond executed by *Dorsey* and *Chapman* varies most materially from the contract, under which the bond was given, with the intention, so far, of executing that contract.

As early as the 14th of April 1815, it appears that a difference of opinion existed as to the true meaning of the original contract, so far as related to the sum of money exempted from interest on account of the legacies; the one, *Smith*, contending that one third of that sum was to be paid as the instalments became due; the other, that no part of that sum was to be paid until the last payment. The subject matter of *this* difference, they referred to the decision of a mutual friend; no opinion, however, appears to have been expressed by him. On the same day the error in the bond having been discovered, by an endorsement thereon signed by *Smith*, he agreed that "the condition of the preceding bond may be defeated by the following payments, to wit: $3,333⅓, with interest thereon from the 13th of March 1814, on or before the 25th of December 1815, and the further sum of $3,333⅓, with interest on $666⅔, from the 13th of March 1814, on or before the 25th of December 1816.

In the fall of 1815, when the second payment was becoming due, the bill alleges that *Smith* in a conversation with *Dorsey*, expressed his apprehensions of bank paper, when *Dorsey* asked him if he would take good bonds. This he refused; but subsequently informed *Dorsey* he would take bank notes, which were obtained, and then *Smith* refused to accept them; and *Smith*, on being told by *Dorsey* he could not afford to keep so much money by him, appeared to assent to a proposition made by *Dorsey*, that he must wait until the money was raised from his crops. Other grounds for relief are set forth in the bill, not deemed material to be mentioned. The great obstacle to a settlement by the parties, was the legacies charged on the land; and after various letters passing between the parties, the one insisting that the land must be exonerated from the legacies previous to the payment of the purchase money, the other the reverse, ultimately one of the legacies was purchased by

Dorsey. Suits were brought on the bond, judgments in *Charles* county court obtained, which were removed to the court of appeals, and there affirmed at June term 1819.

On the 20th of December 1819, the present bill was filed, and injunctions obtained, which were continued by my predecessor, on the motion to dissolve.

Smith, in his answer, denies most of the equitable grounds relied on by the complainants for the interposition of this court, except that he admits two payments, one of $300, and the other of $900, which do not appear to be credited on the judgments; although there is nothing in the cause by which it appears that credit for them was ever refused.

Since the filing of the bill, *Smith* has purchased the other legacy which was charged on the land.

After the argument of the cause an interlocutory decree passed, directing the auditor to state accounts in various ways; and in that decree it was remarked, "as the merits of the cause have been fully argued, there will be no necessity that further time should be spent by an argument on the report; the report is designed to enable this court, as well as the court of appeals, (should the case go before them,) finally to adjudicate on the subject by pronouncing a judgment in favour of the party entitled for the sum which may appear to be justly due And that the accounts may appear in different forms," it was ordered that an account be stated crediting *Dorsey* with the payments, disregarding his claim for the legacy, and charging him with interest. A second account allowing, in addition to the payments, the sum he gave for the legacy, excluding interest after the payments became due. A third account including interest. A fourth account crediting *Dorsey* with such a sum on account of the legacy, as with the addition of seven years' interest thereon, will amount to $1333⅓, or £500, including interest; and a a fifth account, in conformity with the same rules, excluding interest; and such other account in such other way as shall appear to the auditor equitable and just.

In pursuance of the decree the accounts have been stated—one of them crediting *Dorsey* with the sum the legacy was worth, according to the calculations or table of observations by Dr. *Halley*, which are usually resorted to in order to ascertain the present value of a legacy made payable after the expiration of a life. The report and accounts having laid the usual time, the cause at this term stands for final decision.

Several points arise in this case—*First.* Ought interest to be charged, and from what time?

Second. Is *Dorsey* entitled to a credit on account of the legacy charged on the land; and if so, to what amount; that is, ought he to have credit for the price at which he purchased it, or for its real value at that time? And

Third. How should the costs be taxed?

In respect to the *first* point. It appears to me perfectly unimportant to enter into a historical account respecting interest; for although at one time it was not allowed, yet that period has long since, in *Great Britain*, and this state, passed by. Nor is it of consequence whether the interest be considered a part of the debt, or a consequence proceeding from it; and it is equally unimportant whether interest be allowed by way of damages, or for the *use* or *forbearance* of money. Nor is it material to the case under consideration, that there are instances in which interest is not allowed; the question is, is the present a case in which it ought, or ought not to be charged?

I shall consider the question, *first* on principle; and *second*, by the authorities. One of the ancient reasons for excluding interest has long since been exploded, to wit, that it should never be permitted, because money could not produce money. The reverse of this is most true, for nothing can more readily produce money, than money itself; for if a person is fortunate enough not only to have money sufficient for his ordinary demands, that is for the comfortable accommodation of himself and family, but also a surplus, unless that surplus is permitted to lay idle, locked up in his chest, or be injudiciously employed, he will soon find it the most profitable fund he could possess. If you refuse interest on the ground that money cannot produce money, you might as well refuse to the owner a compensation for any other property of which he is deprived, or which is withheld from his possession. Land itself unemployed, or injudiciously used, will never produce money; the labour, industry, and attention of man, must be exercised before its produce can be turned into cash—without labour it must forever remain unproductive; and yet, if the land be wrongfully detained, whether it be productive or not in the possession of the wrong-doer, he is bound to account to the true owner for what it might have produced had it been advantageously or judiciously managed. The same reasoning applies to every other species of property, the possession whereof the true owner is deprived; and as long as money, by being employed, can command an interest sanctioned by the laws of the country in which it is, so long is he, who *withholds* it from the proprietor, bound to pay an interest, whether the money be used or permitted to be idle. It is sufficient that the creditor, or true owner, has been deprived of receiving, and of course from using it.

But in the case now before the court, the parties, by their solemn agreement, have expressly stipulated that interest should be paid on the whole amount of the purchase money, except on the sum of $2,666\frac{2}{3}$, from the date of the original contract—the bond and its defeasance endorsed thereon *renew* the stipulation. The parties, men of intelligence and information, fully apprised of the nature of the interest in the land, which was sold by the one and purchased by the other, fix on its value. It never entered into their minds that the sum of $10,000, agreed to be given, and to be received, was the value of the land if the remainder had taken effect in possession; in other words, if the life-estate had terminated. No doubt, if the purchase money was not to bear interest, a sum equal to the interest, when the payments became due, would have been added to the price agreed on. But, no objection against interest being paid, arises from the contracts themselves; that it ought not to be paid, is insisted on by the complainants, inasmuch as the defendant, on account of the outstanding legacies, was never able to comply with his part of the contract.

This leads to an inquiry into the true construction of that contract. It is contended, on the part of *Dorsey*, that it was incumbent on *Smith*, before he could equitably claim the purchase money, to take up the legacies, or obtain a release from the legatees to free the land from its responsibility. *Smith* in his answer, expressly states, that those legacies had for sometime been an obstacle to a contract between them, and that he agreed to take so small a sum as $10,000 for his interest, on the ground that he might have the use of the money some considerable time before he could be called on to pay them; that he was always willing to indemnify *Dorsey*, and would have done so, but that he insisted, after the contracts were made, and before he would pay, on the previous removal or raising of the legacies, which was contrary to the previous understanding of the parties.

By the original agreement, not one word is mentioned respecting the legacies. The $10,000 were to be paid in three equal payments, and although $2,666 66, a part thereof, were not to bear interest, yet, in order to make the payments equal, the contract appears to require that one third part of that sum should have been included in each payment, and not to be retained for the last. A different interpretation would make the payments unequal, contrary to the express stipulation of the instrument. As the legacies were known to be a charge on the land, *Dorsey* would have been bound to pay them when they became due, or rather, the land in his hands, or of those claiming under him, must have been responsible—the $10,000 would have been the price for the remainder *cum onere*. If it had been the intention of the parties that the legacies should be removed before the payment of the whole or any part of the purchase money, it might easily have been so expressed; but so far from stating with precision how far the payments were to be influenced by them, not one word is said on the subject. It may have happened from their having before been an obstacle to an agreement being closed.

There is very little probability that any expectation was entertained that the legacies would become due before the purchase money for the remainder; but the contract expressly points out the respective periods of payments Except for what is termed by the parties the "rider," no doubt could exist on the subject. The first subject of difference between the parties was not the legacies, but the $2,666 66, whether that sum should be equally paid, as the instalments became due, or reserved to the last.

To remove the necessary inference that the remainder in the land was purchased subject to the legacies, the endorsement signed by the parties is attached to the written agreement—"It is understood that the legacies charged by the will of *Henry A. Smith* to be paid out of his real estate, are not to be satisfied by *C. Dorsey*, but that the land is to be exonerated by *Charles S. Smith from the payment thereof.*" It does not appear to me that this endorsement to the original agreement demanded that the legacies should be taken up before the purchase money for the remainder was paid. It was not in the power of *Smith* to *compel* the legatees to release them, *or* to part with them, nor until they were discharged was it in his power to clear the land from being charged with the payment, and of course it was not in his power to *exonerate* the land he had sold "from the payment thereof." But it may have been in his power effectually to free *Dorsey* from any *real danger* of being forced to pay them. If *Smith* had insisted on the payment of the *whole* purchase money, without first giving an adequate indemnity, the sufficiency whereof this tribunal might have been resorted to to determine, he would have been restrained from enforcing the payment. If *Dorsey* had paid the second instalment, and refused to pay the third, insisting on his right to retain at least as much of that payment as would be sufficient to meet the legacies, he would have been protected by this court; and unless full and complete indemnity was offered, *Dorsey* would have been suffered to retain the $2,666 66, paying the interest, or to bring that sum into court to be invested—the interest for the use of *Smith*—the principal to be paid to the legatees when due. This course would have done complete justice to the parties, and carried fully into execution their engagements. The legacies, therefore, in my opinion do not deprive *Smith* of his title to the interest.

In respect to the allegations in the bill of *Smith's* refusing to receive bank notes, doubting their solvency, and creating an impression in the mind of *Dorsey* of *Smith's* intention to wait until the money could be raised by crops—again expressing a willingness to receive bank paper, which was procured at great inconvenience and loss, it might suffice to observe, that most of those allegations are denied in the answer; and that there is no proof that *Dorsey* ever procured or tendered the notes But if he had obtained the notes, and retained them by him ready at all times to pay on the removal of the legacies, or if he had obtained specie in sufficient abundance, and retained it unemployed, yet unless he gave notice to *Smith* of having the money, and that it was ready for him, and as to *Dorsey* remained unemployed, it would not free him from interest.

In the case of *Powell vs. Martyr*, 8 *Ves.* 146, the defendant purchased at auction—deposited part of the purchase money—the balance to be paid at a future date; where the purchaser was to receive the rents and profits. Objections arose as to the title, when a long correspondence took place, and after considerable delay the objections were removed. During the time of doubt respecting the title, the money was deposited with the vendee's solicitor for the purpose of being paid when the objections were removed; and yet he had to pay interest; for according to the book, "it does not follow that the mere circumstance that the vendor was not ready to complete the title at the day will vary the rule. The purchaser must state something more than mere delay, viz. *that he has not had the benefit of his money; and in some way the vendor must have notice* that the vendee has placed himself in that situation." In *Childs vs. Lord Abingdon* 1 *Ves. jr.* 94, the interest purchased was a reversion upon an estate *for lives.* One life only was remaining when the application was made to complete the purchase. *Erskine*, Chancellor—"He must pay interest. A man cannot purchase a dry reversion, and then lie by for years and expect to pay no more for it then, than if he had completed it immediately." No case, it is believed, can be produced where the parties, perfectly apprised of the nature of the interest sold, (whether it was such as became or might become immediately productive to the vendee, or was what is termed a dry reversion, and therefore supposed unproductive,) stipulated to pay interest, has the interest been refused. In the present case no rational doubt can arise, but that the nature of the estate sold was perfectly understood; and the contract, in respect to interest, speaks for itself. My opinion is, therefore, that the vendee is to be charged with interest on all the purchase money, except on $2,666 66, from the date of the original contract, to wit, the 12th of March 1814; on one third of that sum from the 25th of December following; on one other third from the 25th of December 1815, and on the remaining third from the 25th of December 1816.

In respect to the *second* question. Is credit to be allowed for the legacy purchased, and for what amount?

It is not very evident how much was paid for the legacy purchased by *Dorsey* from *James Wheatly*, who is admitted to be entitled to one of the legacies charged on the land.

By the rider, or endorsement on the original agreement, the "legacies are not to be satisfied by *Dorsey*." If, therefore, he has undertaken to satisfy them, or purchase them, as between him and *Smith*, he is only entitled to their worth at the time of purchase, and not to their worth when they take effect in possession.

According to calculations by which the extent of a widow's dower in land when converted into money, and by which legacies directed to be paid after a life-estate, are regulated, the legacy purchased by *Dorsey* was only worth $560 22; indeed, by the *English* rule, only $349 06. But as that rule is founded on compound interest, on the principle that the interest should (as there it may,) be immediately invested, although we adopt the time at which it is most probable the right to receive the legacy will arrive, yet its value is not come at by compound, but simple interest; and by that rule *Dorsey* can only claim, in addition to the two payments, the sum of $560 22, according to the auditor's statement in account No. 6. And the sum due, according to the statement of the auditor by an additional account made in pursuance of this decree, amounts, on the 17th of February 1817, (the time when the auditor's first statements were made,) to the sum of $5,867 25, including interest to the day.

In directing the principles by which the sum justly and *bona fide* due is come at, no regard is had to the manner of discharging the first instalment; for as the judgments, including interest and costs, excluding the two payments, the benefit of which is obtained by the authority of the court to the extent of those payments, and for the value of the legacy, relief is obtained here; but those who ask equity must do equity, and therefore the only relief which can be obtained against the amount of the judgments, is to get free from their effects by the payment of the sum justly due.

The *last* point is the costs. Considering the difficulties arising in the cause, and the want of an early offer on the part of *Smith* to give complete indemnity as far as practicable, and the persevering demands on the part of *Dorsey* for the entire removal of the legacies, which the contracts did not warrant, and his refusal even to pay the second instalment, it is not thought correct to charge either party with the whole costs, more especially as *Dorsey* will obtain credit for the $300 and $900, which do not appear credited on the judgments, although it seems evident no intention existed to deny them; but not having been credited, executions might have issued for the full amount of the judgments.—Decreed, that unless the complainants shall, on or before the 13th of May next, pay to the defendant the aforesaid sum of $5867 25, with interest on the sum of $5831 39, a part thereof, from the 17th of February 1817, until paid, or bring the same into this court to be paid to the defendant, that the injunctions heretofore issued in this cause be and the same, from and after the said 13th of May, are hereby dissolved: Provided nevertheless, that no more be levied under executions on the said judgments than the said sum of $5867 25, with interest on the sum of $5831 39, a part thereof, from the 17th of February 1817.—*Decreed* also, that each party in this court bear his own costs. From this decree the complainants appealed to this court; and pending the appeal *Chapman's* death was suggested.

The cause was argued before Buchanan, Ch. J. and Earle, Martin, and Archer, J.

C. Dorsey, the Appellant, in *proper person*, contended, 1. That by the decree of the chancellor *Smith* was not bound, from the proof in the cause, to exonerate the land from the liability imposed on him to pay the legacies, before he was entitled to call on *Dorsey* for the payment of the full amount of the purchase money.

2. That the said decree alleges, that the complainant, by his bill, sought relief for a credit of $900 on the judgments, which was not credited thereon, when in fact no such credit was asked

for, the same being credited on the judgments, and so stated in the defendant's answer.

3. That the said decree alleges, that the complainant asked relief, by being credited with interest from the time when the defendant declined receiving the bank notes, when in fact no such relief is aked for by the bill.

4. That the said decree alleges, that since filing of the said bill, *Smith* has procured the release of one of the legacies, when in truth there is no proof of such fact. [The release here referred to is as follows: "*Washington, Kentucky*, 7th April 1821. I do hereby acknowledge to have received of *Charles S. Smith* the sum of five hundred pounds, *(Maryland currency,)* in full for a legacy devised to me by my late brother *Henry Arundel Smith* of *Charles county, Maryland;* and I do hereby release and discharge the said *Charles S. Smith*, and the estate upon which the said legacy is charged, from all future liability therefor. Witness my hand and seal.

Margaret Smith, (Seal.)

Witness present,

John Chambers."

Under a commission issued to the District of *Columbia* to take testimony in this cause, the handwriting of *John Chambers* of the town of *Washington*, in the state of *Kentucky*, the above subscribing witness, was proved. There was also proof by another witness that he knows the handwriting of *Margaret Smith* above mentioned, the sister of *Charles S. Smith*, from frequently corresponding with her, in the course of which correspondence he had received letters with her name signed to them, which from a subsequent course of correspondence he ascertained certainly to be her handwriting; and he had been long and intimately acquainted with her, and that he believed the signature, *Margaret Smith*, to the above paper, to be her handwriting; and he did not believe he could be mistaken about the signature.]

5. That by the said decree a credit is allowed to the complainant for the sum of $560 22, for his interest in the legacy purchased by him of *Wheatly*, when a larger sum ought to have been allowed.

6. That by the said decree no interest is allowed to the com-

plainant, from the time when the complainant requested *Smith* to convey his title to the land, and offered to pay him therefor, and to pay him for the legacies, when he procured a release, and when he refused to do so.

7. That the said decree allows interest on one third of the sum \$2,666⅔ from the 25th of December 1814, one other third from the 25th of December 1815, and one other third from 25th of December 1816, when no interest ought to have been allowed.

8. That the said decree decrees the sum due to the complainant on 17th of February 1817, to be the sum of \$5,867 25.

9. That the said decree does not decree that upon the payment of the purchase money, *Smith* shall convey the land bought, to *Dorsey*.

10. That the said decree decrees that the injunction may be dissolved, and that execution may issue on the judgments, without decreeing that the defendant shall indemnify the complainant against the liability of the land for the legacy of Mrs. *Smith*.

11. That the said decree allows interest on the amount of the legacies, when none ought to have been allowed.

12. That the said decree decrees that each party shall pay his own costs, by him incurred.

On the *first* point he insisted, that no parol evidence can be admitted to vary a written contract. *Pow. on Cont.* 430. *Rob. on Frauds* 10, 13. *King vs. Baldwin*, 2 *Johns. Chan. Rep.* 557. *Jones vs. Sluby*, 5 *Harr. & Johns.* 380.

The defendant's answer is not evidence in his own favour. *Peake's Evid.* 56. *Paynes vs. Coles*, 1 *Munf.* 373, 379. *Lady Ormond vs. Hutchinson*, 13 *Ves.* 51, 53. *Jones vs. Sluby*, 5 *Harr. & Johns.* 380. *Hart vs. Ten Eyck*, 2 *Johns. Chan. Rep.* 62.

On the *fourth* point. The release of the legacy was witnessed by *Chambers*, and he was not produced to prove it; but secondary evidence only was offered, viz. proof of the handwriting of the witness and the releasor, without sufficiently accounting for the nonproduction of the attesting witness. *Prince vs. Blackburn*, 2 *East*, 250. *Barnes vs. Trompowsky*, 7 *T. R.* 261.

On the *fifth* point. If the appellant had sued the appellee for the amount paid for *Wheatly's* legacy, he would have recovered the amount so paid. He must be considered as the agent of the appellee, doing that with his money which he was bound to do himself. The rule adopted by the chancellor, in allowing the appellant for the legacy purchased by him, was not the correct one. Doctor *Halley's* rule is not the chancery rule of this state.

On the *sixth* point. If the money was withheld, then interest is to be paid. When had the appellee a right to call for his money? It may be answered—When he gave an equivalent for it. What was that equivalent? A deed for the land, and a release from the legatees. Until he did so, he had no right to demand either the money or interest. The deed and release, and payment of the money, were concurrent acts to be performed at the same time. When the appellee brought his suit on the bond, he had no right to demand payment. He had no right to demand interest except for three years if he had complied in time. After he refused to comply, he had no right to require interest. Refusing to comply with a contract is a fraud; and a new contract sprung up after that refusal. *Hoare vs. Allen*, 2 *Dall. Rep.* 102, *(note.)* Interest upon a specialty may, under certain circumstances, be taken away in equity. *Haynes vs. Harrison*, 1 *Cas. in Chan.* 106. A vendor has no right to call for his money until he has tendered a conveyance to the vendee for the land sold. 1 *Madd. Chan.* 350. *Grantland vs. Wight*, 2 *Munf.* 186. *Blount vs. Blount*, 3 *Atk.* 636. *Wainwright vs. Read, et al.* 1 *Desauss.* 586.

If the purchaser is let into possession, &c. he pays interest; and *Powell vs. Martyr*, 8 *Ves.* 146, has been referred to by the chancellor to establish that principle. But suppose he is not let into possession under the purchase, then of course he does not pay interest. The case referred to is not applicable to the present. Here the purchaser was in possession under a superior title; and the contract for the purchase of the remainder was not a purchase of possession, but of title.

But here the appellee had no right to receive payment until he removed the incumbrance, which he had contracted to do. *Sugden*, 312. In *Child vs. Lord Abingdon*, 1 *Ves. jr.* 94, also referred to by the chancellor, there was a solemn contract to pay interest by a third person, not by the tenant for life, who was the purchaser. In *Ex parte Manning*, 2 *P. Wms.* 410, the wearing out of the life was equivalent to profits. So also in *Davy vs. Barber*, 2 *Atk.* 489. But in *Blount vs. Blount*, 3 *Atk.* 636, the doctrine in the two last cases is exploded. *Growsock vs. Smith*, 3 *Anstr.* 877. cited in *Sugden*, 323. *Maynard's* case, 2 *Freeman* 2, cited in *Sugden*, 312.

On the *seventh* and *eighth* points. The chancellor has opened the whole contract—the defeasance, the first payment, and the judgment at law, without being asked to do so by the appellee's answer, and without any error being alleged either in the defeasance or the judgment. He has done that which was not required by either party.

On the *ninth* point. The decree does not direct that on payment of the purchase money, the appellee shall convey the land to the appellant. *Grantland vs. Wight*, 2 *Munf.* 179.

R. Johnson, for the Appellee. On the *fourth* point, he insisted that the proof of the release of the legacy was sufficient. If the subscribing witness is out of the jurisdiction of the court, his handwriting may be proved. That that is the rule in *England*, and is the rule here. 1 *Starkie's Evid.* 338. *Fox vs. Reil*, 3 *Johns. Rep.* 477. *Sluby vs. Champlin*, 4 *Johns. Rep.* 461.

On the *ninth* point. The decree is, that the money should be brought into court, and when so brought in, the chancellor would not direct the payment over until a deed for the land was executed to the appellant. But the record shows that a deed for the land had been executed, and it was exhibited with the defendant's answer as an *escrow*.

On the *second* point. The credit of $900 was not allowed on the judgments at law, as affirmed in the court of appeals, of course it was proper to be noticed in the decree, otherwise the appellee might have issued an execution for the whole sum. There was no injury, but rather a benefit to the appellant in allowing the credit. It is true the credit was entered on the judgments in the county court, but the records transmitted under the appeals to the court of appeals, do not state the credit; and it was on the affirmed judgments, executions were to issue.

On the *twelfth* point. If the decree in other respects is right, then it is correct as to the costs. *West vs. Biscoe*, 6 *Harr.* & *Johns.* 460. *Glenn vs. Fisher*, 6 *Johns. Chan. Rep.* 33.

On the *fifth* point. There is no proof as to what sum of money the appellant paid for *Wheatly's* legacy.

On the *sixth* point. There is nothing in the contract which binds the appellee to clear the incumbrance on the land at the end of three years. As the appellant neglected to pay the last instalment in December 1816, interest was then to be charged on the whole sum due. The appellant, being tenant of the fee under his purchase, he could cultivate the land with more advantage than he could do as tenant for the life of Mrs. *Dorsey*. *Powell vs. Martyr*, 8 *Ves.* 146. *Fludyer vs. Cocker*, 12 *Ves.* 25. When the land was sold to the appellant it was worth $10,000; and if so it is now worth at least $20,000—the life-estate being supposed to be nearly expended. To compensate the appellee interest should be paid on the purchase money. *Ex parte Manning*, 2 *P. Wms.* 410. *Sugd.* 326, 320; and *Hughes vs. Kearney*, 1 *Sch. & Lef.* 132, 134.

Magruder and *Taney*, in reply.

Archer, J. delivered the opinion of the Court. There appear to be two principal questions presented in this cause, for the consideration of the court.

First. Ought the appellant, *Dorsey*, to be charged with interest, from what time, and on what portion of the purchase money?

Second. For what sum ought *Dorsey* to be credited on account of the legacy purchased by him?

The determination of the first question will depend upon the construction which shall be given to the contract between the parties. When the appellant purchased the remainder upon the death of his wife, *Smith* stipulated that he would *exonerate* the lands so purchased from the payment of the legacies charged upon it. We cannot concur with the chancellor in the belief, that by this *Smith* only agreed to indemnify

Dorsey against the payment of the legacies, but we consider it an undertaking to free the lands sold from all liability to pay them. The lands were charged with these legacies, and it was the object of the parties that the title to *Dorsey* should pass unincumbered by them. There is no impossibility in this covenant, as events have proven; it was one, to be sure, which might be somewhat difficult in its execution, but the legal obligation of the party must not on this account be changed. It is his agreement which has been voluntarily entered into, and the other party had a right to its performance before he could in equity be called on to pay the whole purchase money. The first instalment due by *Dorsey* on the original contract for the sale of the lands was paid, and before the second instalment became due *Dorsey* entered into a bond, conditioned for the payment to *Smith* of the residue of the purchase money, as follows: $3,333⅓, with interest from the 13th of March 1814, on or before the 25th of December 1815, and the sum of $3,333⅓, with interest on $666⅔, from the day of sale, on the 25th of December 1816. Thus by this contract there seems to have been a partial modification of the original agreement as to the payments, and being the last stipulation must be considered as binding on the parties.

By a fair construction of these agreements, although *Dorsey* had agreed to pay the whole of the purchase money by the 25th of December 1816, and *Smith* had stipulated generally that the land should be exonerated from the payment of the legacies, without having named any definite time, we consider that he was bound to have complied with his contract on the day at which the last instalment became payable. But *Smith* had, unquestionably, the whole time until that period to comply with his part of the agreement, and could not, until then, be considered in default. *Dorsey's* second instalment, with interest thereon, became due a year before, according to this construction of the agreement, *Smith* could be called on to comply on his part. He never could have looked to the exoneration of the land as a condition upon which that instalment was to be paid. He should have paid it when it became due, and his liability to pay interest thereon is not in the least changed by any of the subsequent events. He had expressly agreed to pay interest on that sum from the date of the purchase; and the same remark may be made with regard to a part of the third instalment, to wit, the sum of $666\frac{2}{3}$. On this he had expressly stipulated to pay interest. Could he, on any principles of equity, claim to be relieved from this express agreement? Has he tendered the money; has be been ready ever since to pay it? There is no evidence of this kind. To have placed himself in a situation to be relieved against the payment of interest on this sum, he should not only have professed a willingness to have paid, but he should have tendered the amount, which he has not done. We therefore think, that the appellant should pay interest on the second instalment, and on $666\frac{2}{3}, of the third instalment. But as regards the residue of the third instalment, to wit, the sum of $2,666\frac{2}{3}, it is to be observed, that there is not only no express promise to pay interest, but there is, by the terms of the contract, an entire exemption from payment of interest. That sum was to be paid on the 26th of December 1816, without interest; but *Smith* having put a different construction on the agreement, positively refused to *exonerate* the lands from the payment of the legacies. *Dorsey* was then justified in withholding from him payment of this sum; and according to the spirit of the original agreement, ought not, after such default, and until compliance, be compelled to pay interest on that sum. There is no principle of law which would, in such a case, entitle the vendor to the payment of interest. Had *Dorsey* been in possession of the lands in virtue of the purchase, or in the perception of the rents and profits, in equity he would have been compellable to pay interest, because such advantages would have been considered as equivalent to interest. But he had not possession by the contract. The tenant for life was in possession, and enjoying, in virtue of such life-estate, the rents and profits. He was the purchaser of a *dry remainder*. But it is contended that the wearing out of the life-estate is equivalent to taking the profits. And this it is true, is the general position laid down in *Sugden*, 323; and the cases of *Ex parte Manning*, 2 *P. Williams*, 410, and *Child vs. Lord Abingdon*, 1 *Ves. Jr.* 94, are cited in support of the position. The case of *Ex parte Manning* came in review before Lord *Hardwicke*, in the case of *Blount* *vs Blount*, 3 *Atk.* 635, who remarked that he never knew "the court take into consideration, as a reason for the purchaser paying interest, the wearing out of lives." This doctrine of Lord *Hardwicke* is sanctioned in the case of *Growsock vs. Smith*, 3 *Anstruther*, 877. The falling in of lives may be considered as equivalent to the rents and profits. *Davy vs. Barber*, 2 *Atk.* 489. *Blount vs. Blount*, 3 *Atk.* 636. And in the case *Ex parte Manning* a life had fallen in between the date of the purchase, and the application to complete the purchase; and besides, in that case the purchaser, from the date of the confirmation of the report of sale, was considered as entitled to the estate, and no obstacles were presented, or could be presented, to a completion of the title; but here the incumbrances stipulated to be released were still hanging over the purchased estate, with refusal on the part of the vendor to release them. In the case of *Child vs. Lord Abingdon*, there was a decree for the payment of interest. The Lord Chancellor said, a man could *not lie by for years*, who was the purchaser of a dry reversion, and expect to pay no more for it than if he had completed it immediately. The decision in this case is put upon the ground of delay in the purchaser who was waiting until the remaining life dropped in. Besides, in this case, like the case of *Ex parte Manning*, the purchaser's title might be considered as only requiring payment on his part to complete it. The principles which mark the distinction between the case under consideration, and those above cited, are too obvious to require further comment, or more minute illustration. When *Smith* complied with his contract in exonerating the land by the purchase of the last outstanding legacy, he was entitled to receive the part of the last instalment, amounting to the sum of $\$2,666\frac{2}{3}$, and as it was not then paid, he was entitled to interest thereon from that period. This legacy was purchased by the appellee on the 7th of April 1821, from which day he should have interest on that sum.

We consider the release executed by *Margaret Smith* valid for the purpose for which it was intended, and that the proof of its execution is sufficient. Where an instrumentary witness resides out of the jurisdiction of the court, so as not to be amenable to its process, or cannot be found after strict and diligent inquiry, the proof of the handwriting of such witness is evidence of every thing on the face of the instrument. The sealing and delivery will be presumed. *Vide* 1 *Phil. Evid.* 419, (362,) and the cases there cited.

The consideration of the sum which should be allowed *Dorsey* for the legacy purchased by him, involves a question which has not been adjudicated by this tribunal. Should he be allowed what he proves he has paid for it? We think not. By the contract he was not to pay the legacies; it was *Smith's* business to disencumber the land. And, if he is made to suffer by the purchase, he has no person to blame but himself. When *Smith* refused to exonerate the land in violation of his contract, he subjected himself to the legal consequences of such an act; but it would be a most inequitable consequence of such refusal to say that *Dorsey* was thereby constituted his agent, with unrestricted powers to make the purchase; such a result would have placed him at *Dorsey's* mercy. But equity demands, that having purchased the legacy he should be entitled to a credit, as against *Smith*, for the legacy, at its fair value, from the date of the purchase, (17 Feb. 1817.)

By what rule is its value to be estimated? The chancellor, in his decree, has adopted that value which was ascertained by the auditor by a reference to Doctor *Halley's* table of observations, which have been used in *England* for the purpose of ascertaining the value of life annuities, and reversionary interests. These tables are framed upon long and accurate observations on the bills of mortality in *England*, and in other places, and may not be an unsafe guide for the purpose in the region or latitude for which they were calculated. But the probability of the duration of human life, cannot be the same in every latitude and climate In the one it may be prolonged to the greatest age—in the other abbreviated to what, in a more healthful region, would be considered as but a middle age; and even, indeed, in the same district of country the chance for the duration of life is by no means the same. Thus, would tables suited for the low lands of *Louisiana*, furnish any index of the duration of human life in the highlands of *Maryland?* And even in our own state, could any dependence be placed in the calculation of the value of an annuity, or of a reversion expectant upon a life, which would say that as great a probability existed for the duration of human life amid the marshes of the *Chesapeake Bay*, as in the mountains of *Alleghany?* These observations will be found to be verified by an examination of Dr. *Halley's* tables, as suited to different parts of *England*, and to places on the continent. Whether these tables, upon which the chancellor's decree is founded, are suitable to this state, could only be told by a long series of observations here, which not having been made, we conceive it would be unsafe to adopt them. In ascertaining the value of this legacy at the time of its purchase, we apprehend, there would be a much better chance of justice being effected by applying by analogy the rule adopted long since in the court of chancery for the purpose of ascertaining the allowance to a woman, in lieu of dower, in land sold under a decree of that court. Mrs. *Dorsey* is shown to have been about forty years of age at the date of the purchase, and the calculation should be made in conformity with the above rule. By such calculation the legacy was worth the sum of $761 90. With this value the appellant should be credited on the day of the purchase of the legacy. He should also have credit for the sum of $300, paid on the 26th of February 1816, and the further sum of $900 on the 29th of December 1816.

We concur with the chancellor in his judgment as to the costs incurred in that court.

It is our opinion the appellant should be decreed to pay into the court of chancery the sum due *Smith*, on some day to be fixed by this court, and on failure to pay by such day, that the injunction ought to be dissolved. And it is further our opinion, that the appellee, in case the appellant should pay into court the sum ascertained to be due by the day to be appointed, be only permitted to receive the same, upon his satisfying the chancellor that he has executed, acknowledged and delivered, to the appellant, *Dorsey*, a good and sufficient deed of conveyance, passing all his right to the lands sold the appellant in conformity with their contract dated the 13th of March 1814. Decreed, that the decree of the court of chancery, except as to the costs incurred in that court, be reversed, and that the appellant recover against the appellee, the costs by the appellant expended in the prosecution of his appeal to and in this court. And this court, proceeding to pronounce such decree as the court of chancery ought to have pronounced—*Decreed* also, that there shall be credited on the judgments mentioned in the proceedings the sum of $300, paid on the 26th of February 1816; the sum of $900, on the 29th of December 1816; and of the further sum of $761 90, paid on the 17th of February 1817, to *James Wheatly*, for his mother's legacy. That the sum of $2,666⅔, being part of the last instalment, shall bear interest from the 7th of April 1821; and that the claim of the appellee arising on the said judgments be stated as follows:

Clement Dorsey in account with *Charles S. Smith.*

For principal of second insalment,		$3,333 33
Part of third instalment,		666 67
		4,000 00
Interest thereon from the 13th of March 1814 to the 29th of December 1816,		670 67
Costs on judgments at law,		35 86
		4,706 53
1816. February 26. Then paid	300	
December 29. Then paid	900	1,200 00
		3,506 53
Interest on balance to the 17th of February 1817,		28 05
		3,534 58
Then paid James Wheatly,		761 90
		2,772 68
Interest on balance to the 13th of July 1826,		1,564 72
Amount of legacies,		2,666 67
Interest on $2,666 67 from the 7th of April 1821 to the 13th of July 1826,		842 67
		$7,846 74

Decreed also, that unless the appellant shall, on or before the 1st of January next, bring into the court of chancery, to be paid to the appellee, the said sum of $7,846 74, with interest on $5,439 35 part thereof, from this 13th of July 1826 until brought in, the injunctions heretofore issued in this cause be and the same, from and after the said 1st of January next, shall be dissolved; Provided nevertheless, that no more be levied under executions on the said judgments at law, than the sum of $5,439 35, with interest on $2,772 68, part thereof, from the 17th of February 1817, and with interest on $2,666 67, the residue thereof, from the 7th of April 1821, until paid, together with any additional costs that may accrue on any proceedings that may be had on the said judgments. *Decreed* also, that in case the appellant shall, by the 1st of January next, bring into the court of chancery the said sum of $7,846 74, with interest on $5,439 35, part thereof, from this 13th of July 1826 until brought in, the appellee shall be only permitted to receive the same upon his satisfying the chancellor that he has granted and conveyed to the appellant, and his heirs, in fee simple, by a good and sufficient deed of conveyance, duly executed, acknowledged and recorded, according to law, passing all his right, title, estate and interest, to and in the lands sold to the appellant, in conformity with their contract bearing date the 13th of March 1814. And in case the appellant shall fail to bring into the court of chancery by the 1st of January next, the said sum of money, with interest as aforesaid, the injunctions on the judgments aforesaid shall not be dissolved, unless the appellee shall satisfy the chancellor that he has, by a good and sufficient deed of conveyance, duly executed, acknowledged and recorded, according to law, granted and conveyed the said lands to the appellant, and his heirs, in fee simple, in the manner before stated. And *decreed* also, that the chancellor pass all necessary orders and decrees for carrying this decree into full and complete effect.

DECREE REVERSED, &C.

DORSEY *vs.* HAYS.—June, 1826.

A landlord may distrain the goods of his tenant, fraudulently and clandestinely removed off the demised premises to avoid his rent, under the stat. 11 *Geo.* II, *ch.* 19, within thirty days from the time of removal, although the lease, upon which the rent was due, may then be determined, and the tenant may not be in possession of the premises.

An avowry, in a case of that kind, which only avers that the goods were fraudulently and clandestinely removed by the tenant, without also avering that they were so removed with a view to avoid the rent, is rendered good, if issue be taken on the fact that they were so removed with that intention; although it might, perhaps, be bad on demurrer.

In replevin where the defendant avows the taking for rent, the same jury who try the cause, may assess and value the goods distrained, without the avowant's praying that they should do so.

To support an avowry for rent, it is not necessary that it should be averred, that the avowant's interest in the demised premises continued at the time of the distress.

APPEAL from *Harford* County Court. Replevin for slaves, &c. stated in the declaration to have been taken by the defendant, (the appellee,) on the 25th of May 1823, from certain closes called *Ann's Dower* and *Osborn's Lot*, and from the dwelling-house of the plaintiff, (the appellant.) The defendant avowed the taking the goods and chattels mentioned, in the several places in which, &c because the plaintiff for a long time, to wit, for the space of two years next before and ending on the 1st of May 1823, and from thence until, &c. held and enjoyed a certain dwelling-house with, &c. in the town of *Belle Air*, at, &c. as tenant thereof to the defendant, by virtue of a certain demise thereof to him the plaintiff theretofore made, at the yearly rent of $150, payable annually; and because the sum of $300 for the rent aforesaid, for the said space of two years, ending as aforesaid on the 1st of May 1823, and from thence until and at the time when, &c. was due and in arrear from the plaintiff to the defendant; and the defendant avers, that the plaintiff on the said 1st of May 1823, fraudulently and clandestinely removed the said goods and chattels from the said dwelling-house to the said places in the declaration named; and the defendant avers, that he pursued the said goods and chattels within thirty days after the said removal thereof; and well avows the taking thereof in the places in the declaration mentioned, and justly, &c. for and in the name of a distress for the said rent, so due and in arrear to the defendant as aforesaid; and this he is ready to verify: wherefore he prays judgment, &c. The plaintiff pleaded three pleas to the avowry—1. That the defendant, for the reasons alleged, ought not to avow the taking of the goods, &c. in the said place where, &c. as just, because the sum of $300, of the rent aforesaid, at the time when, &c. was not in arrear and unpaid, &c. Issue tendered.

2. That the defendant, at the said time when, &c. of his own wrong took the goods, &c. and unjustly detained them, &c. until, &c. in manner and form as the plaintiff had above complained against him; and this the plaintiff is ready to verify, &c.

3. That the plaintiff did not fraudulently or clandestinely carry off the said goods, &c. to prevent a distress, as the defendant hath alleged. Issue tendered. To the first and third pleas the defendant joined in issue. To the second plea he replied in the language of his avowry, and tendered an issue, which was joined in by the plaintiff. Verdict for the avowant, and the sum of $113 75 rent in arrear found to be due, and that the goods and chattels were worth $113 75. Motion by the plaintiff in arrest of judgment, for the following reasons—1. Because the defendant in his avowry alleges that he made the distress in the avowry mentioned, after the determination of the lease upon which the rent became due, and does not allege that the plaintiff remained in possession of the demised premises. 2. Because it is not alleged in the avowry that the goods therein mentioned were fraudulently or clandestinely removed to prevent a distress. 3 Because the jury, empannelled to try this cause, have assessed and found the value of the distress, without the avowant's having prayed that they should do so. 4. Because it is not alleged in the avowry that the said goods, in the avowry mentioned, were taken during the continuance of the avowant's title or interest in the said premises alleged to have been demised to the plaintiff.

Motion overruled, and judgment rendered on the verdict for the avowant for $113 75, rent in arrear, with interest, &c. and costs. The plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and DORSEY, J.

Speed, for the Appellant, referred to the statutes 11 *Geo. II, ch.* 19, and 8 *Ann, ch.* 14, *s.* 6. 2 *Wheaton's Selw.* 502; and 1 *Wheaton's Selw.* 501.

Gill, for the Appellee, cited *Poole vs. Longuevill*, 3 *Saund.* 284, *(note 3.)* The statute 11 *Geo. II, ch.* 19, *s.* 22. 3 *Chitty's Plead.* 531. The statute 17 *Charles II.* 2 *Sellon's Pr.* 179, 180; and 1 *Sellon's Pr.* 498.

DORSEY, J. delivered the opinion of the Court. This court concur in opinion with the county court in overruling the motion in arrest of judgment. The distress was levied under the statute of 11 *Geo.* II, *ch.* 19, which has never received that limited construction sought to be imposed on it by the reason *first* assigned as a ground for arresting the judgment. Such a limitation would contravene the express provision of the statute, and almost entirely defeat the design of its framers. According to the finding of the jury, no case could come more completely within both its letter and its spirit, than the present. If the *second* reason assigned had been presented to the court below in the shape of a demurrer to the defendant's avowry, it would have been entitled to some consideration; but the plaintiff having waived that objection, and distinctly put in issue the fact of the goods having been fraudulently or clandestinely removed to prevent a distress, and that issue being found against him, upon no principle of pleading, or of common sense, can this exception to the avowry warrant the arrest of the judgment. The *third* and *fourth* grounds are equally untenable, and derive no sanction whatever from books of precedents of high authority.

JUDGMENT AFFIRMED.

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NEALE *vs.* CLAUTICE.—June, 1826.

A general demurrer to a plea confesses all the facts which are well pleaded.

A plea in trespass is bad on demurrer that does not cover the whole trespass laid in the declaration, although it need not answer matter stated in aggravation of damages.

In an action of trespass for taking personal chattels, the declaration must state them to be the plaintiff's at the time of the taking, or the omission will be fatal even after verdict.

In such an action of trespass, where the declaration contained the averment of property in the plaintiff at the time of the taking, a plea, justifying the taking as a distress for rent due the defendant by a third person, and that the chattels were on the demised premises when the rent accrued, and were fraudulently removed, and afterwards pursued and taken within thirty days, is insufficient, because it does not deny that they were, at the time of the taking, the property of the plaintiff. If such a plea averred them to belong to the tenant when taken, the plea would seem to be good, except as to form.

In such an action a plea, that the property in the chattels was in the defendant, or in a third person, would be bad on special demurrer, because it would amount to the general issue.

Where goods are fraudulently removed by a tenant to avoid his rent, and afterwards are sold by him to a *bona fide* purchaser, the sale is valid under the statute 11 *Geo.* II, *ch.* 19.

Goods of a third person cannot be taken for rent, except they are found, at the time of the distress, on the premises.

The general replication *de injuria sua propria*, &c. is only proper where matter of excuse is pleaded in the defendant's plea, and not where he relies upon title.

Where the judgment of the inferior court against the plaintiff, on demurrer to the pleadings, was reversed, a *procedendo* was awarded.

APPEAL from *Baltimore* County Court. Action of trespass. The writ was that the defendant, (now appellee,) answer unto the plaintiff, (the appellant,) "in a plea of trespass, &c." And by the declaration the plaintiff complained, that the defendant on the 10th of June 1820, at, &c. with force and arms, seized, took and detained, the goods and chattels to wit, &c. of the plaintiff, then and there found, and being of a large value, to wit, of the value of, &c. and carried away the same, and converted and disposed thereof to his own use, and other wrongs to the plaintiff then and there did, against the peace, government and dignity of the state, &c. and to the damage of the plaintiff of, &c. The defendant pleaded two pleas. 1. The general issue plea, which was afterwards struck out by consent of the parties. 2. "And for further plea in this behalf the defendant, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, says, that the plaintiff his action aforesaid thereof against him to have or maintain ought not, because he says, that a certain *John G. Neale*, on the tenth day of June, in the year eighteen hundred and twenty, and for a long space of time then last past, and from thence until, and at the said time, when, &c. held and enjoyed a certain messuage or tenement, situate and being at the county aforesaid, as tenant thereof, to the defendant, under and by virtue of a certain demise thereof, before then made to the said *John G. Neale*, upon which demise a certain yearly rent, to wit, the rent or sum of one hundred and fifty dollars, per annum, was reserved and made payable by the said *John* to the defendant, in manner following, to wit, fifty dollars in advance; fifty dollars in six months, and fifty dollars in twelve months, in each and every year during the continuance of said demise; and the defendant in fact says, that just before the said time, when, and so forth, to wit, on the thirteenth day of May, in the year eighteen hundred and twenty, a large sum of money, to wit, the sum of one hundred dollars of the rent aforesaid, for a portion of said term, ending on the day and year last aforesaid, became and was due, owing and payable, from the said *John G. Neale* to the defendant, and from thence until and at the said time, when, &c. became, remained and continued in arrear and unpaid; and the defendant avers, that just before the said time, when, &c. that is to say, after the said rent became due and payable, and when the same was actually due and in arrear and unpaid, and within thirty days next before the said time, when, &c. the said *John G.* fraudulently and clandestinely carried off the said premises, so held and enjoyed by him the said *John G.* as such tenant thereof as aforesaid, the said goods and chattels in the said declaration mentioned, being the proper goods and chattels of him the said *John G.* to prevent the defendant from distraining the same, for the rent so before and at the time of the said removal, actually due in arrear and unpaid, and for that purpose conveyed the said goods and chattels to the said place in which, &c. for which reason, and because the said rent still remained in arrear and unpaid, and because the said goods and chattels, which had been so fraudulently and clandestinely removed and carried away by the said *John G.* as aforesaid, after the said rent was due and in arrear, still remained in the said place in which, &c. to which the same had been removed, the defendant in his own right, afterwards, and when the said rent so remained due, in arrear and unpaid as aforesaid, and within thirty days next after the said furniture, goods and chattels, were and had so been fraudulently and clandestinely removed and carried away, that is to say, at the said time when, &c. entered into the said place in which, &c. in the said declaration mentioned, in order to seize and take the said goods and chattels, so being there as aforesaid, as a distress for the said arrears of rent, so due and owing to the defendant as aforesaid, and thereupon, at the said time, when, &c. and within thirty days next after the said goods and chattels in the said declaration mentioned, had been and were so fraudulently and clandestinely removed away and carried off as aforesaid, in the said place in which, &c. take and seize the said goods and chattels so there found, as a distress for the said arrear of rent, and did impound the same at a small and convenient distance from the said place in which, &c. and did thereupon give due notice of such distress, and of the cause of such taking, and of the said place where the said goods and chattels were impounded unto the said *John G.* and did keep and detain the said parcel of said goods and chattels under the said distress, for the space of five days next after the taking and carrying away the same as aforesaid, in order to give the plaintiff an opportunity to replevy the same, according to the form of the statute in such case made and provided; and the said *John G.* not having replevied the said goods and chattels, within the said space of five days, the defendant in his own right afterwards, and after the expiration of said five days, to wit, on the first day of July, in the year aforesaid, caused the same to be in due manner appraised, by two sworn appraisers, according to the form of the statute in such case made and provided, and after such appraisement, the defendant sold the same, and applied the proceeds of said sale in satisfaction of said rent, and the charges of the distress and appraisement aforesaid, as he lawfully might, for the cause aforesaid, inasmuch as the plaintiff had not replevied the said goods and chattels, or paid the said arrear of rent, together with the costs and charges of said distress, and appraisement aforesaid; and this he is ready to verify: Wherefore he prays judgment if the plaintiff, his action aforesaid thereof to have or maintain ought, and so forth." To this last plea the plaintiff replied as follows: "And the plaintiff, as to the said plea of the defendant, by him secondly above pleaded, as to the said several trespasses in that plea mentioned, and therein attempted to be justified, saith, that the plaintiff, by reason of any thing mentioned by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action; because he saith, that the defendant, at the said time, when, &c. of his own wrong, and without the cause by him in his second plea alleged, committed the said several trespasses in that plea mentioned, in manner and form as the plaintiff hath above in his declaration complained against him, the defendant; and this he, the plaintiff, prays may be inquired of by the country, and so forth." The defendant demurred specially to the replication, and assigned the following causes of demurrer in law to the said replication, that is to say, "that the same is double, inasmuch as the said replication tends to put in issue several various and distinct matters, when the same ought to have put one single matter in issue only, and also, that he attempts to put in issue by said replication, all the several matters and things in the said plea contained, whereas he should have traversed one single matter whereon a proper issue might be joined; in this, that the defendant states in his plea the following distinct facts, to wit," &c. "And the replication tends to put in issue all the various and distinct matters aforesaid, when the same ought to have put one single matter in issue only. And that the said replication is uncertain, not issuable and wants form," &c. The plaintiff joined in demurrer. The county court sustained the demurrer, and rendered judgment for the defendant. From which judgment the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and DORSEY, J.

Raymond, for the Appellant, contended, that there was no fault in the pleadings on the part of the plaintiff. That if the pleadings were defective, it was the fault of the defendant, and not of the plaintiff. He cited 1 *Chitty's Plead.* 512. *Robinson vs. Rayley,* 1 *Burr.* 316.

Meredith, for the Appellee. 1. The writ is not in the legal and accustomed forms of such writs in trespass. It is general that the defendant answer unto the plaintiff *in a plea of trespass, &c.* without stating what the trespass consisted of.

2. The facts stated in the defendant's plea were essential to his defence, but the plaintiff did not chuse to select any one of the acts, but took issue on the whole. Any one of the facts alleged in the plea would, if proved, defeat the plaintiff's action. The replication should have selected some one of the facts upon which the issue should be tried, and not deny the whole, and put them all in issue. *Crogate's* case, 8 *Coke*, 67. *Cockerill vs. Armstrong*, *Wille's Rep.* 99. *Bell vs. Wardell*, *Ib.* 202. The case of *Robinson vs. Rayley*, 1 *Burr.* 316, has been doubted to be good law by many decisions. *Jones vs. Kitchim*, 1 *Bos. & Pull.* 78, *(*Arg. of Sergt. *Marshall.)*

3. If the plea is double, yet it could only be taken advantage of by special demurrer. Instead of which the plaintiff replied putting in issue every fact stated in the plea. *Arch. Plead.* 193. 6 *Com. Dig.* tit. *Pleader*, 163, 164, *(New Ed.)* 1 *Chitty's Plead.* 646, 647. *Stephen's Plead.* 163, 164. If the plea is bad for duplicity, it must be bad by putting in issue more than one defence. The replication then is general to two defences.

4. The replication is insufficient upon other grounds. Advantage may be taken of a replication on special demurrer, though the cause is not stated in the causes of demurrer. Where *de injuria* is improperly replied, the defendant may demur generally, but the defect will be aided after verdict. 1 *Chitty's Plead.* 584. *Collins vs. Walker*, Sir *T. Ray.* 50. *Banks vs. Parker*, *Hob.* 76. *Fursden vs. Weeks*, 3 *Lev.* 65. The replication *de injuria*, &c. is only allowed in actions of trespass for personal injuries. 6 *Com. Dig.* tit. *Pleader*, *(F.* 18.*)* *Lytle vs. Lee & Ruggles*, 5 *Johns. Rep.* 112. *Hyat vs. Wood*, 4 *Johns. Rep.* 150. *Plumb vs. M'Crea*, 12 *Johns. Rep.* 491. *Taylor vs. Markham*, *Yelv.* 158. The replication puts in issue the fact of title to the premises, as well as to the property. Where the question of title is involved, the plaintiff is always precluded from replying generally. 2 *Roll.* 694. A general replication is admitted only where the defendant insists upon a matter by way of excuse. *Lytle vs. Lee & Ruggles*, 5 *Johns. Rep.* 113, 114. *Cooper vs. Monke*, *Wille's Rep.* 52. 1 *Chitty's Plead.* 583, 584.

Raymond, in reply. The writ is correct for all necessary purposes. It is not necessary in this state to set out in the writ the particular trespasses complained of, bail being required here by statute. In *England* the defendant must be served with the process, showing what is complained of, so as to demand bail. *Tidd's Pr.* 144.

EARLE, J. delivered the opinion of the Court. The attention of the court is called to the pleadings of this case. It is an action of trespass for taking the personal goods of the plaintiff. To the declaration, which is in common form, the defendant pleaded specially; and he also pleaded the general issue plea, which by consent was withdrawn from the case. The special plea purports to be a justification of the taking, for a distress for rent, not due to the defendant by the plaintiff, but from his tenant *John G. Neale*, who is charged with fraudulently removing the distrained property, being his own proper goods and chattels, from off the demised premises, to prevent the distress, to the place where, &c. to which place they were followed within thirty days, and seized and sold by the defendant for the payment of his rent. To this plea the plaintiff having replied, *de injuria sua propria absque tali causa*, the defendant demurred specially, and assigned for cause of demurrer the duplicity of the replication, inasmuch as it tended to put in issue various and distinct matters, when the same ought to have put one single matter in issue only, and attempted to put in issue all the several matters and things in the plea contained, whereas it should have traversed one single matter, whereon a proper issue might have been joined.

The legal sufficiency of the replication furnished the principal ground of the arguments of the counsel, although the plea was also adverted to, as being defective. If it is so in form the fault is cured by the pleading over of the replication; but if it is substantially incorrect, the fault must determine the case against the defendant, as it is the first to be found in the pleadings. By way of testing its soundness, the court have inquired whether it is a good plea on general demurrer? and their reflections have brought them to the conclusion that it is not. When applied to a plea, a general demurrer confesses all its well pleaded facts; and if all the facts contained in this plea are admitted to be true, the plaintiff we think must nevertheless prevail, because the gist or ground of his action, as set forth in his declaration, is not thereby answered. A plea in trespass is bad on demurrer, that does not cover the whole trespass as laid in the declaration, although it need not answer matter stated in aggravation of damages. *Taylor vs. Cole*, 3 *T. R.* 297, per *Buller*, J. The plaintiff here has alleged in his declaration, that the goods and chattels mentioned therein, at the time of the taking of them by the defendant, were *his goods* and chattels, and if he had omitted the averment, the omission would have been fatal even after verdict, the objection being a want of title, and not a title defectively stated. 1 *Chitty's Plead.* 366, and the authorities there cited. This demonstrates the importance and character of this fact stated in the declaration, and there is no answer given to it in the plea, either by denying it, or by confessing and justifying it. The plea may be said to assert the goods in question, to be the proper goods and chattels of the defendant's tenant, when they were fraudulently removed by him from the demised premises; but it is silent as to their being the goods and chattels of any particular person at the time of the taking in the place where, &c. If it were admitted that they were the proper goods and chattels of the tenant, when they were removed by him from the premises, it would not thence follow, that they were his property many days after, when they were taken from the plaintiff, in the name of a distress for rent due from the tenant. The plaintiff might, in the meantime, have purchased them *bona fide* of the tenant; and by the statute of 11 *Geo.* II, *ch.* 19, *s* 1, 2, the sale would have been protected. 3 *Chitty's Plead.* 551, (in the note.) The defendant should have denied the property of the plaintiff, at the time of taking, and as he has omitted to do this, the declaration is not covered by the plea. The general issue plea would have been a denial of the property of the plaintiff in the goods at the time of the taking, and imposed on him the necessity of proving it, or showing his right to sue. The defendant might also have put the same fact in issue, by a plea of property in himself, or his tenant, at the time of the taking, if he had thought proper to hazard a plea, which would have been bad on special demurrer, because it amounted to the general issue plea. In the same way he might have added to his plea before us, that when he seized the goods in the place where, &c. they were the proper goods and chattels of his tenant, and not the plaintiff's, which perhaps would have made of it a good plea, except as to form. Neither of those modes of negation has he, however, adopted; and his plea used as justification is not suited to the case, and does not justify the act complained of. It would have been a suitable plea, if the tenant had been the plaintiff, but will not answer the defendant's purpose, as the action is brought by a stranger. To justify, he might well confess by his plea the goods and chattels carried off the premises to be the property of his tenant, because he has a right to follow them, if they are fraudulently removed to prevent his distress; while a similar admission in the case of a stranger, would be to concede himself to be liable to his action. For the goods of a third person cannot be taken for rent in any place, except on the leased premises; and to admit by plea the taking as a distress for rent of the goods of such a person in *alio loco*, is little short of saying that they are not liable to the distress insisted on; and a justification following such an admission, could be of no avail.

So much having been said of the plea, it seems unnecessary for the court to speak of the replication. As its invalidity, however, was a point more than any other insisted on, we will briefly give our opinion in relation to it.

Without attending to the particular causes of demurrer pointed out, it appears to us that the replication is not sustainable in this case; *de injuria sua propria absque tali causa*, is a plea often resorted to in practice, but where it may be legitimately used, must be determined by a reference to *Crogate's Case*, 8 *Co. Rep.* 66. This case is the foundation of all subsequent decisions on this question, and is an authority universally acknowledged. Adjudications of later date are little else than interpretations, given by successive judges, of *Crogate's Case*, as applicable or not to the subjects which have come under their consideration. In the second resolution of the case, Lord *Coke* says, "the general plea *de injuria sua propria, &c.* is properly where the defendant's plea doth consist merely upon matter of excuse, and no matter of interest whatsoever;" and this makes the use of this general replication to depend on the matter of the defendant's plea. If matter of excuse is pleaded, the general replication is an appropriate plea; but if matter of interest is insisted on, a special reply is necessary. This distinction has been observed and enforced by the most modern decisions on this subject. Such are the cases of *Cooper vs. Monke,* and *Cockerill vs. Armstrong* in *Willes's Rep.* 52 *&* 100; the case of *Jones vs. Kitchim,* 1 *Bos. & Pull.* 76, and *Lytle vs. Lee and Ruggles,* 5 *Johns. Rep.* 112; and such the law in *White vs. Stubby,* 3 *Saund.* 295, *(note* 1.*)* All these authorities are decided on the ground that the general replication, *de injuria sua propria absque tali causa,* is bad, when the defendant insists on a right, as *P. Clautice* does in this case, and is good only when he pleads matter of excuse.

JUDGMENT REVERSED.

Raymond then moved the court to order a writ of *procedendo,* or *special mandate,* to the court below, directing them to proceed in the cause, and to award an inquiry as to the damages to be assessed to the plaintiff, &c. He referred to *Briscoe vs. Ward,* 1 *Harr. & Johns.* 165. *Davis vs. Wilson,* 2 *Harr. & Johns.* 345. *Davis vs. Benson,* 6 *Harr. & Johns.* 272. 2 *Sellon's Pr.* 399, 400. *Vicars vs. Haydon,* 2 *Cowp.* 843. *Tidd's Pr.* 687. *Foxwist vs. Tremaine,* 2 *Saund.* 210, 211, *(notes* 2, 3.*)* *Fox vs. Smith,* 2 *Wils.* 267. *Bowen vs. Shapcott,* 1 *East,* 542, 544. *Owen vs. Saunders, Colles's P. Cas.* 73. *The Queen vs. Ford, Ib.* 336.

PROCEDENDO AWARDED.

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EICHELBERGER *vs.* FINLEY & VAN LEAR.—June, 1826.

Notice of nonacceptance of a bill of discharge, is not necessary where the drawer, at the time when presentment should be made, has no effects in the hands of the drawee, or having such effects, withdraws them before presentment is made, and has no reasonable grounds to expect his bill to be honoured.

In relation to notice in such a case, there is no distinction between a refusal to accept, and a refusal to pay, the same principles apply to both.

A party who draws a check upon a bank, without funds in the bank to meet it, is not entitled to notice of nonpayment, nor is he discharged by the holder's not presenting it within reasonable time.

Between individuals there may be a mutual confidence and credit, and they may honour each other's bills with or without effects, so as perhaps to entitle them to notice, though they have no effects; but no such confidence or credit can exist between a bank, and its customers; and the officers of a bank cannot, without a gross violation of their trust, honour a check or draft beyond the amount of the drawer's deposits.

APPEAL from *Baltimore* County Court. This was an action of *assumpsit*, brought by the appellees against the appellant and *W. Eichelberger*, (who was returned *non est*,) for work and labour, goods, wares and merchandise, for money lent and advanced, and paid, laid out and expended, and on an *insimul computassent*. The general issue was pleaded. The plaintiffs at the trial offered to read in evidence the two following checks, drawn by the defendants—"No. 613. *Baltimore*, March 26th 1819. Cashier of the *Commercial and Farmers' Bank.* Pay to *M. E.* or bearer, fourteen hundred and fifty dollars. 1450 dollars. *J. & W. Eichelberger.*" "No. 619. *Baltimore*, March 26th, 1819. Cashier of the *Commercial and Farmers' Bank.* Pay to No. 619, or bearer, fifteen hundred dollars. 1500 dollars. *J. & W. Eichelberger.*"

And also proved, that they, were the legal holders of the same. That the checks were presented for payment at the *Commercial and Farmers' Bank*, upon which they were drawn, on the third of June, subsequent to the date of the same. The defendants then gave in evidence, by Mr. *Dunbar*, the Cashier of said bank, that on the day of the date of said checks, the defendants had funds in said bank to the amount of $500; on the day following, to the amount of $400; and for several days subsequent, had from two to four hundred dollars of funds in said bank. They also proved that no notice was given to the defendants of the nonpayment of the checks, until the 3d of June 1819, the day on which they were presented, as stated in the plaintiff's evidence, for payment. And they also proved by the same witness, that the defendants were indebted on a *stock* transaction, to the said bank, in more than the amount they had then in bank; and in May 1819, the funds which the defendants then had in bank, were appropriated by the bank to the payment of said debt. The plaintiffs then further gave in evidence, that it was the general usage of the banks in *Baltimore* not to pay checks, unless the party drawing them had funds sufficient to meet the same; but that sometimes the cashier paid them for a small amount, when there were not funds sufficient to meet them. And it was admitted that said bank, during the whole period from the date of said checks, to the present time, was solvent. The defendant then moved the court to instruct the jury, that upon the whole of the evidence the plaintiffs were not entitled to recover; which instruction the Court, [*Archer*, Ch. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and DORSEY, J.

R. Johnson, for the Appellant, contended, 1. That the neglect of the appellees to present the checks at the bank, upon which they were drawn for payment, within a reasonable time, and the neglect to give notice of their nonpayment by the bank, within a reasonable time, to the appellant, (the drawer of the checks) entitled the appellant to the direction and opinion he prayed in the court below. 2. That the presentation and notice on the 3d of June 1819, were not made within a reasonable time; and that the want of sufficient funds, as set forth in the bill of exceptions, was not in law an excuse for the neglect to make such presentment, and give such notice within a reasonable time.

On the *first* point, he cited *Chitty on Bills*, 24, 280, 282; and *Rickford vs. Ridge*, 2 *Campb.* 537.

On the *second* point, he cited *Bickerdike vs. Bolman*, 1 *T. R.* 405. *Walwyn vs. St. Quintin*, 1 *Bos. & Pull.* 654. *Legge vs. Thorpe*, 12 *East*, 175. *Clegg vs. Cotton*, 3 *Bos. & Pull.* 241. *Thackray vs. Blackett*, 3 *Campb.* 144. *Blackhan vs. Doren*, 2 *Campb.* 503. *Chitty on Bills*, 215 to 223. *Orr vs. Maginnis*, 7 *East*, 359. *Dennis vs. Morris*, 3 *Esp. Rep.* 158; and *Clopper vs. The Union Bank of Maryland*, (*ante* 92.)

Gill, for the Appellees, cited *Chitty on Bills*, 318, 319, (*London Ed.*) *Brown vs Maffey*, 15 *East*, 221. *Cruger vs. Armstrong*, 3 *Johns. Cas.* 259; and *Cory vs. Scott*, 5 *Serg. & Low.* 401.

DORSEY, J. delivered the opinion of the Court. Were the appellees, under all the circumstances of this case, bound to use reasonable diligence in demanding payment, and in giving notice to the defendant of the dishonour of his checks, are the only questions submitted to the consideration of the court. It is not pretended that a failure to do so has subjected him to loss or inconvenience.

"The reason," (says *Chitty*, in his Treatise on Bills of Exchange,) "why the law requires the holder to give due notice of nonacceptance by the drawee is, that the anterior parties to the bill may respectively take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given, it is a presumption of law that the drawer and endorsers are prejudiced by the omission." The requisition of notice of nonpayment rests on precisely the same principle.

On this simple and once universal rule an innovation was made by the decision in *Bickerdike vs. Bollman*, 1 *T R.* 405, which, with the most of the distinguished judges in *England* since that period, has been a theme of regret; and in their zeal to limit the operation of the exception there introduced, within the smallest practicable compass, they have explained and frittered it away, until there is but little of it left; and the reasons upon which, in their decisions, they have made that little to depend, are so various, inconsistent, and unsatisfactory, that it is a task of no inconsiderable difficulty to extract from them any certain rule of law, by which this class of cases may be readily distinguished. The rule Justice *Buller* professed to establish in *Bickerdike vs. Bollman* was, that notice to the drawer was not necessary, "if it be proved on the part of the plaintiff that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands." The reason of the rule, as there stated by the learned judge, was that the drawer could not be injured by the want of notice. In *Clegg and another vs. Cotton*, 3 *Bos. & Pull.* 239, the rule dispensing with notice is stated to be founded on the fraud of the drawer in drawing without effects; and the same position is also advanced by Justice *Ashhurst*, in *Bickerdike vs. Bollman*. But the fallacy of this doctrine, (if authority be necessary to show it,) is fully established by cases of *Legge vs. Thorpe*, 12 *East*, 170, and *Claridge vs. Dalton*, 4 *Maule & Selwyn*, 226, where the conduct of the defendants is free from the slightest imputation of fraud. The true *rationale* of the rule introduced in *Bickerdike vs. Bollman*, is that given by Justice *Buller*, "that the drawer could not be injured by the want of notice." Why not injured by the want of notice? Because the object of notice is to let the drawer know that his bill has been dishonoured, and this he already knew from the nature of the circumstances connected with it. To require a party to be notified of a fact of which he has already a perfect knowledge, does appear to be a solecism not at all in harmony with that beautiful system of reasoning and good sense, which pervades every branch of legal science. The many distinguished judges who have disapproved of this rule, in expressing their regrets at its introduction, correctly state it to be "the substitution of knowledge for notice," and yet when called upon to apply the principle to the facts in each particular case, such has been the anxiety to limit the extent of its application; such the desire to ingraft upon it restrictions and discriminations, by which future cases may evade its operation, that in subtleties and refinements the essence and meaning of the rule has been almost wholly lost sight of. Of this the case of *Orr and others vs. Maginnis*, 7 *East*, 359, is a memorable illustration. There, a captain in the *African* trade in January 1802, in *Demerara*, drew a bill of exchange upon Messrs. *Mullian*, *Lennox* and *Co.* of *Liverpool*, for £172 18 1, payable at 90 days sight to the plaintiffs, or order, at which time the drawer had effects, (but to what amount does not appear,) in the hands of the drawees, but in May 1802, his whole balance, amounting to the sum of £116, was paid to him by them, they having no notice of this bill; and from July 1802, when it was presented for acceptance, up to the 22d of October 1802, when it was presented for payment and refused, the drawees had no effects of the drawer in their hands. No notice of nonacceptance was given to the drawer, he not being then to be found, having no settled place of residence, and for want of such notice the plaintiffs were nonsuit at the trial. A motion for a new trial was overruled by the Court of King's Bench, and Lord

Ellenborough, in delivering their opinion, bottoms the refusal on the ground that the drawer had effects in the hands of the drawees *at the time the bill was drawn.* If a case can be imagined in which a want of effects, with a knowledge in the drawer that his bill would be dishonoured, dispenses with notice, it might well be supposed that this was that case. It does not appear that the drawer, at the time the bill was drawn, before or subsequently, ever had credit with the drawees for one farthing more than to the amount of the effects in hand. Having then withdrawn the only fund which could sustain the honour of his bill, did he not know by anticipation the fact of its nonacceptance? The knowledge of the drawer, which is deemed a substitute for notice, does not depend upon that state of things which exists at the time the bill is drawn, but which exists at the time it should be presented. It matters not, therefore, whether the drawer have effects with the drawee when the bill is drawn, or not, nor whether he then have any reasonable grounds to expect that his draft will be accepted. Even if the drawer, contemplating a fraud, should at the time of drawing have no effects in the drawee's hands, and should not expect to have any at any period thereafter, or that his bill would be honoured; yet, if before presentment, repenting of his conduct, he should place adequate funds with the drawee, can it be doubted that he would be entitled to notice? And *e converso*, if a drawer having ample effects in the drawee's hands at the time of drawing. and confidently expecting that his bill would be honoured, should before presentment fraudulently withdraw them from the drawee, abandoning all expectation of the honour of his bill, can it be denied that he would not be entitled to notice? And why? Because the knowledge, which is imputed to him, is that which he possessed at the time of presentment, not of drawing. Upon reasoning and on principle, therefore, the true rule applicable to cases of this kind appears to be, that notice is dispensed with where the drawer, at the time when presentment should be made, had no effects in the hands of the drawee, or having such effects should withdraw them before presentment is made, and in neither case should have any reasonable grounds to expect that his bill would be honoured.

It must be admitted that the doctrine here advanced is somewhat at variance with the opinion of the supreme court of the *United States*, delivered by Chief Justice *Marshall* in *French's Ex'x. vs. The Bank of Columbia*, 4 *Cranch*, 157, in which it is stated that it cannot be said "that actual notice is useless, and the want of it can do him (the drawer,) no injury, for this is only true when *at the time of drawing* the drawer has no reason to expect that his bill will be paid.

This case has been treated as if it had arisen on a refusal to accept, when in truth it arises on a refusal to pay; but as far as concerns the matters here in controversy, the principles regulating both cases cannot be distinguished.

The same rule having been adopted in practice in this state, and sanctioned by courts of justice, as that recognized in *Bickerdike vs. Bollman*—under the circumstances of this case, is such knowledge of the nonpayment of his checks to be imputed to the appellee, as supersedes the necessity of actual notice? On this subject the court, looking as they must do only to the facts in the record, entertain not the shadow of a doubt that he knew, when he drew the checks, that they would be dishonoured, and never at any subsequent period had reason to expect that they would be paid by the bank, and cannot therefore set up as a defence the want of notice. The cases of *Orr and others vs. Maginnis*, 7 *East*, 359, and *Thackray vs. Blackett*, 3 *Campb.* 164, have been urged by his counsel as conclusive in his favour. But it is conceived, that waiving all exceptions to the soundness of those decisions, they bear no application to the case now under consideration. They were made on transactions between individual correspondents who may have had a mutual confidence and credit, and were perfectly competent to honour each other's bills drawn either with or without effects. Not so as to the officers of the public banking institutions in this state. With them the customers of the bank have no accommodation credit, and without a gross violation of their trust, they can honour no check or draft upon them, beyond the amount of deposits standing to the credit of him by whom such check or draft may be drawn.

It has been objected, that the failure to present the checks for payment within a reasonable time, has discharged the drawers. But there is nothing in this objection. If demand had been duly made, and payment refused, he was not entitled to notice thereof. It was an act, therefore, the omission or performance of which, as to him, was wholly immaterial.

JUDGMENT AFFIRMED.

* * *

SEMMES *vs.* SEMMES, *et al.*—June, 1826.

The cancelling of a will by a testator is an equivocal act, and does not amount to a revocation unless it is done *animo revocandi.*

Where it is a dependant relative act, done with reference to another will, which the testator thinks he has legally executed, it may be a revocation or not, as such other will is valid or not. As where a testator, having executed one will, causes another to be prepared, and cancels the first, only because he supposes the second to be duly executed, the cancelling the first will not operate as a revocation of it, if the second proves to have been improperly executed. But where the cancelling is deliberately done without accident or mistake, it will operate as a revocation, notwithstanding the party may at the time have intended to make another will, and afterwards omitted to make it.

The cancelling in this case declared to be a revocation.

APPEAL from a decree of the Orphans Court of *Charles* county, refusing to admit to probat and record a paper offered as the last will and testament of *Ignatius Semmes*, deceased.

The cause, (which is sufficiently explained in the opinion delivered by this court,) was argued before BUCHANAN, Ch. J and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Stonestreet, for the Appellant, objected to the decree of the orphans court—1. Because it did not appear that the deceased made the obliterations which appeared on the face of the will. 2. Because if he did, they were made with a view to a new will, which was never perfected, and not with a design to an intestacy.

On the *first* point, he insisted that the *onus probandi* of the obliterations, was on the party who attempted to set aside the will. He cited *Onions vs. Tyrer,* 1 *P. Wms.* 343, *(note.)*

On the *second* point, he cited *Roper on Wills,* 35, 36. *Goodright vs. Glazier,* 4 *Burr.* 2515. *Onions vs. Tyrer,* 1 *P. Wms.* 343; and *Gilb. Evid.* 246, 427.

C. Dorsey and *Brawner,* for the Appellees, cited *Roper on Wills,* 35, 36. *Pow. on Dev.* 422. 8 *Vin. Ab.* 142, 143.

Taney, in reply. The *memorandum* made at the foot of the will, shows that the testator did not mean to revoke the devises in his will, except as concerned his deceased wife. His mind was not changed as to any other part of his will. His declarations as proved, show that he did not mean to die intestate; and the will was found after his death, among his most valuable papers. His not mentioning to Col. *Merrick*, who had drawn his will, and with whom he was in company when in *Baltimore*, that he intended to make another will, when his then state of health would naturally call his attention to the subject, shows that he did not consider his will as revoked.

BUCHANAN, Ch. J. delivered the opinion of the Court. It is objected, on the part of the appellant, that the orphans court did wrong in not admitting to probat a paper, purporting to have been a duly executed will of *Ignatius Semmes*, on two grounds: *First.* Because the obliterating the name of *Ignatius Semmes*, and also the names of the three subscribing witnesses, does not appear to have been done by the deceased; and *secondly.* That if it was, it did not amount to a revocation of the will.

With respect to the first proposition, it does not appear to admit of a doubt, that each obliteration was made by the deceased *Ignatius Semmes.*

The *memorandum* at the foot of the paper, and just below the signatures, in these words—"In consequence of the death of my wife, it is become necessary to make another will," and signed *Ignatius Semmes*, is admitted to be in his handwriting. The obliterations were made by drawing a pen frequently, and in different directions, across his own signature, and the names of the subscribing witnesses; and the ink with which it was done, is proved to have been the same with which the memorandum at the foot of that paper was written. Hence it is manifest, that the obliterations, and the memorandum, were simultaneous acts, and by the deceased himself; and it would be straining overmuch to admit the supposition, that it might have been surreptitiously done by another, in the absence of any testimony to cast the slightest shade of suspicion upon any body. The memorandum must be considered as connected with the obliterations as a part of the *res gesta*, and as explanatory of the transaction. It is equivalent to a declaration, that he had made the obliterations, for the reason assigned, (the death of his wife,) which made it necessary to make another will.

Considering then the obliterations to have been made by the deceased, the second objection presents itself, to wit, that the will was not thereby revoked; in support of which several authorities were cited and relied on in argument, but none of them sustain the proposition, and it would be somewhat strange if they did.

In *Onions vs. Tyrer*, 1 *P. Williams*, 343, the deceased, by a will duly executed to pass real estate, devised lands to trustees, to certain uses, and afterwards made another will devising the same lands to other trustees, but to the same uses, with a clause of revocation of the first, and attested by three witnesses, who did not sign their names in the presence of the testator. Supposing the second will to be duly executed to pass real estate, the testator caused the first to be cancelled. But it was determined, that the witnesses to the second, not having signed their names in the presence of the testator, it was void as to the land, and could not therefore have the effect to revoke the former; and the cancelling of the first will, under the presumption that the second was good and effectual, was held not to amount to a revocation of it, on the ground that it was done by mistake. The case of *Hyde vs. Hyde*, 8 *Vin. Ab.* 142, was clearly a case of mistake. And the case of *Mason vs. Limbrey*, cited by Lord *Mansfield*, in 4 *Burr.* 2515, was decided on principles not at all applicable to this case.

The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi*. And where it is a dependant relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation. But never where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will.

It is said, and indeed it would seem from the testimony, that *Ignatius Semmes* did not intend to die intestate, but however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole of his estate to his wife, in trust for the "use and support of herself, and the benefit, education and support," of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one half of his personal property absolutely to his wife; but she dying, he struck out his own signature, and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done, that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by cancelling. In *Burtenshaw vs. Gilbert*, 1 *Cowp*. 49, which was cited in argument, there were two wills, and after the death of the party, the second will, with a duplicate of the first, which he had kept himself, were found together among his papers both cancelled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will was revoked. The only question raised, was whether the revocation of the second will did not set up the uncancelled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will.

DECREE AFFIRMED.

* * *

Elder *vs.* Warfield.—June, 1826.

Every collateral undertaking to answer for the debt, &c. of another is, by the statute of frauds, void, if not in writing; but original undertakings are not within the statute, and need not be in writing.

Where there is a preexisting debt, or other liability, a promise to pay by a third person, having immediate respect to, and founded upon, such debt or liability, without any new consideration moving to him, is a collateral undertaking, and is within the statute.

But where, distinct from the original liability, there is a superadded consideration for the promise, moving between the party making it, and him to whom it is made, the undertaking is an original one, and is not within the statute.

Where there is no previous liability, but the promise of one is the inducement to, and ground of, the credit given to another, such promise is also a collateral undertaking, and within the statute; the rule being, that wherever the party undertaken for, is originally liable upon the same contract, the statute applies; but where such party is under no original liability, the promise is an original undertaking, not embraced by the statute, and is good, and his becoming liable afterwards does not alter the rule, though not in writing.

In cases of this kind of the sale of goods, &c. the liability of the parties obtaining them depends upon the question, to whom was the credit given? And that is a question for the decision of the jury; though there are cases under the statute in which the liability of the party undertaken for, is a question of law. The debiting the party obtaining goods with them in the books of the vendor, not conclusive evidence that the credit was given to him.

In an action upon a valid collateral undertaking to pay the debt of another, the declaration must be on the special promise; but upon an original undertaking the proper remedy is *indebitatus assumpsit*.

APPEAL from *Baltimore* County Court. *Assumpsit.* The defendant, (the now appellant,) pleaded the general issue. At the trial the plaintiff, (the appellee,) offered in evidence, by *Alfred Warfield*, the plaintiff's brother and clerk, that in the year 1817, the plaintiff was applied to by *Joseph Berrett* to furnish him with necessaries for his family, on credit; that the plaintiff, having doubts of *Berrett's* solvency, declined to do so, and refused to let him have the goods he applied for. That at this time the defendant lived on part of a farm belonging to *Berrett's* wife, in what character, whether as manager, overseer or trustee, he knew not. That subsequently the defendant called and requested the plaintiff, through the witness, to let *Berrett* have goods, &c. which he wanted, and told the plaintiff that *Berrett* was perfectly solvent, and did not owe more than $500, and was willing and able to pay his debts; that *Berrett* had recently sold property in *Baltimore* for a considerable sum of money, and the plaintiff should be paid out of it. The plaintiff still doubted, when the defendant told him to let *Berrett* have goods, and he would be responsible for the amount, and pay it out of the proceeds of the said sale of *Berrett's* property, which he the defendant expected to receive. This agreement was not reduced to writing, or any memorandum made of it. The plaintiff in the years 1817, 1818 and 1819, let *Berrett* have various goods, wares and merchandize. The plaintiff further gave in evidence, by the same witness, that after the conversation aforesaid, between the plaintiff and defendant, *Berrett* upon his orders, obtained at different times, goods and merchandize to the amount of $523, being the same goods and merchandize for the recovery of whose value the action was brought. And further proved, by the witness, who during that time kept the plaintiff's books, that the said goods, as they were sold, were charged to *Berrett*, and that the whole account stands on the ledger of the plaintiff, headed "Mr. *Joseph Berrett* to *Charles D. Warfield*, Dr." with the words "*assumption*, or *suretyship*, or *guarantee*, of *John Elder*," (the defendant.) The witness did not certainly remember which word, but believes it was "*guarantee*" written opposite, and he considered them synonymous. The plaintiff also proved by the same witness, that the account produced was frequently presented to the defendant, who promised to pay, and that the signature *Charles D. Warfield*, to the receipt at the bottom of said account, was the plaintiff's. "*Baltimore* county, 27th March, 1819. Rec'd. of Mr. *J. S. Berrett*, a note for five hundred and twenty-three dollars, being for the above account, and a note of his for one hundred and fifty-seven dollars and three cents, which, when paid, will be in full. The note bearing date the 27th March, 1819, is payable at six months. *Chas. D. Warfield.*"

That the said account was also frequently presented to *Berrett*. The plaintiff further gave in evidence, that the note mentioned in said receipt for $523 given the plaintiff by *Berrett* and his wife, was taken at the defendant's request, and by his suggestion; and that after the said goods were furnished to *Berrett*, and before the said note was taken, and after it was taken, the defendant acknowledged himself to be answerable to the plaintiff for the said debt, and promised to pay it, but never gave any written acknowledgment or promise, or signed any memorandum in writing to that effect. The plaintiff further gave in evidence, that *Berrett* resided in *Baltimore* before his removal to the country, and in 1812 applied for the benefit of the insolvent laws, and was discharged; that in 1813 he again applied and obtained a discharge, and also in 1819. He also offered evidence by *Matthew Murray*, that in 1817, *Berrett* was considered insolvent, and that the defendant paid the fees due from *Berrett* to him for 1817 and 1818, and offered an acknowledgment for the fees for 1819. He also offered evidence by *Walter Worthington*, that the defendant told the witness that he was willing to pay the plaintiff's claim, and considered himself responsible, but that he had been desired not to do so by *Columbus O'Donnell*, and had received from said *O'Donnell* a bond of indemnity in the event of a judgment against him; that the defendant had had property assigned him by *Berrett*, which he had conveyed to *O'Donnell.* The defendant then prayed the opinion of the court, and their direction to the jury, that on the whole of the said evidence, the plaintiff was not entitled to recover; which opinion and direction the Court, [*Archer*, Ch. J. and *Ward*, A. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, and Dorsey, J.

R. Johnson, for the Appellant, contended, that the promise of the appellant to pay the debt being in parol, notwithstanding the circumstances in the case, was void under the statute of frauds. He referred to the statute in *Rob. on Frauds, Appendix*, 467. *Buckmyer vs. Darnall*, 2 *Ld. Raym*, 1085. *Matson vs. Wharam*, 2 *T. R*, 80. *Anderson vs. Hayman*, 2 *H. Blk.* 120. 1 *Com. on Cont.* 53. 1 *Bac. Ab.* tit. *Agreement*, 123. *Lamborn vs. Watson*, 6 *Harr. & Johns.* 252; and *Lamborn vs. Moore*, *Ib.* 422.

C. S. W. Dorsey, for the Appellee, cited *Phillips vs. Bistolli*, 9 *Serg.* & *Low.* 163. *Davis vs. Davis*, *(ante* 36.*)* *Burt vs. Gwinn*, 4 *Harr. & Johns.* 507.

Buchanan, Ch. J. delivered the opinion of the Court. The bill of exceptions, on which this case is brought up, was taken to the refusal of the court below to direct the jury that the plaintiff was not entitled to recover; and the *fourth section* of the statute of frauds, by which it is provided, "that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage, of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him properly authorised," is relied upon to sustain the appeal.

The record does not inform us why the court refused to give the direction prayed; whether on the ground, that in the opinion of that tribunal, upon the facts in the cause, the plaintiff was entitled to recover, or because it was deemed the province of the jury to determine to whom the credit was originally given. The statute of frauds has furnished a wide field for the exercise of judicial ingenuity; and it is perhaps to be regretted, that in the range of construction any of its provisions should have been infringed or evaded.

A strict adherence to the letter, would, it is believed, have prevented much litigation, of which the introduction of exceptions has proved a fruitful source; it may now, however, be assumed, as the settled construction of that branch of the *fourth section*, on which this case depends, that every collateral understanding, or promise, to answer for the debt, default or miscarriage, of another, is within the statute, and void, if not in writing; but that original undertakings are not within the statute, and need not be in writing.

Collateral and *original*, have become the technical terms, whereby to distinguish promises that are within, and such as are not within the statute. And as they are terms not used or defined in the statute itself, it may here be proper to notice the general distinguishing characteristics of collateral and original promises, as understood in relation to the statute of frauds.

Where there is a preexisting debt, or other liability, a promise by a third person, having immediate respect to, and founded upon the original liability, without any new consideration moving to him, to pay or answer for such debt or liability, is a collateral undertaking—as in the case of *Fish vs. Hutchinson*, 2 *Wils.* 94, which was an action founded on a promise by the defendant to pay a debt due from one *Vickars* to *Fish*, (for which *Fish* had brought suit,) in consideration that *Fish* would stay his action against *Vickars*, which being a promise to pay the still subsisting debt of another, was held to be clearly within the statute. And so in *Kirtham vs. Martin*, 2 *Barn. & Ald.* 613, where *A* having wrongfully killed the horse of *B*, a promise by *C* to pay *B* the damages he had sustained, in consideration that he would not sue *A*, was adjudged to be within the statute.

But where, distinct from the original liability, there is a new and superadded consideration for the promise, moving between the party promising, and him to whom the promise is made, in such case it is an original undertaking—as in *Williams vs. Leper*, 3 *Burr.* 1886, where the defendant, having got possession of goods which were subject to distress for rent in arrear, promised the landlord, (the plaintiff,) to pay him the rent, if he would desist from distraining.

There the promise by the defendant was to pay the amount of rent due from another; but the parting by the landlord with his lien on the goods in the defendant's possession, and thus relieving them from liability to be distrained upon, was a new and superadded consideration, moving between the landlord and the defendant, and the immediate ground of the promise.

There are many cases proceeding upon this distinction, between a promise founded upon the liability alone of a third person, and one which is induced by a distinct and superadded consideration moving between the immediately contracting parties—as *Anstey vs. Marden*, 4 *Bos. & Pull.* 130; *Castling vs. Aubert*, 2 *East*, 325; and *Read vs. Nash*, 1 *Wils.* 305.

Again, where there is no previously existing debt, or other liability, but the promise of one is the inducement to, and ground of, the credit given to another, by which a debt or liability is created in him to whom the credit is given, such a promise is a collateral undertaking.

The general rule being, that wherever the party undertaken for, is originally liable upon the same contract, the promise to answer for that liability is a collateral promise, and must be in writing. As if *B* gives credit to *C* for goods sold and delivered to him, on the promise of *A* to *see him paid*, or *to pay* *him for them if C should not*, in that case it is the immediate debt of *C*, for which an action will lie against him, and the promise of *A* is a collateral undertaking to pay that debt, he being only as a security.

But where the party undertaken for is under no original liability, the promise is an original undertaking, and binding upon the party promising, without being in writing. Thus, if *B* furnishes goods to *C*, on the express promise of *A* to pay for them, as if *A* says to him, let *C* have goods to such an amount, and I will pay you, and the credit is given to *A*, in that case *C* being under no liability, there is nothing to which the promise of *A* can be collateral; but *A* being the immediate debtor, it is his original undertaking, and not a promise to answer for the debt of another. The case of *Buckmyer vs. Darnall*, 2 *Ld. Raym.* 1085, may be considered a leading and instructive case on this subject. And *Watkins vs. Perkins*, 1 *Ld. Raym.* 224; *Harris vs. Huntback*, 1 *Burr.* 371. *Jones vs. Cooper*, 1 *Cowper*, 227; *Matson vs. Wharam*, 2 *T. R.* 80; *Anderson vs. Hayman*, 1 *H. Blk.* 120; and *Keate vs. Temple*, 1 *Bos. & Pull.* 158—are illustrative of this general position, *that whether a promise is collateral or original, depends upon the liability of the party undertaken for.*

Hence the first point of inquiry in such cases is, *whether the party undertaken for, is liable at all on the contract;* or, *to whom the credit was originally given?* The existence of such liability being implied in the very notion of a collateral undertaking.

In ascertaining which, the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the case, should be taken into consideration; and in the case of goods, &c. furnished for the use of one at the instance of another, where the undertaking is collateral, the declaration in an action for the amount, founded on such collateral undertaking, must be on the special promise.

But where it is an original undertaking or promise, the proper remedy is the action of *indebitatus assumpsit.*

This is an action of general *indebitatus assumpsit*, for goods furnished to *Joseph Berrett*, at the instance of the appellant, which is resisted on the ground of a supposed subsisting liability on the part of *Berrett*, to whom it is contended the credit was originally given, and therefore, that the promise of the appellant not being in writing, was void under the statute of frauds.

If *Berrett* was originally liable, it is very clear that the promise of the appellant was merely collateral, and within the statute; but whether he was or was not liable, depends upon the further question, *to whom was the credit given?* For if the credit was not given to him, but to the appellant, then it was not his debt, but the immediate debt of the appellant, for which he is liable in this form of action, notwithstanding the promise was not in writing, being an original undertaking, and not a collateral promise, within the statute, to answer for the debt of another.

And even if *Berrett* has since become liable, such subsequent liability cannot have the effect to alter or change the original character of the appellant's promise; but such as it was at the time of the contract, it is now. The inquiry therefore, at the trial, should have been, *what was the predicament of the parties at the time the goods were delivered; was the credit given to Berrett on the suretyship of the appellant, or was it given to the appellant himself alone?* And not whether by subsequent circumstances, *Berrett* had rendered himself liable.

It is the undoubted province of the court, to determine questions of law, arising upon the facts of a cause, and the equally unquestioned province of the jury to decide the questions of fact. Whether the party undertaken for, was originally liable at all upon the contract, is not always a question of fact, but there are cases in which it is a question of law to be decided by the court. As in *Buckmyer vs. Darnall*, before cited, which was an action against *Darnall* on his undertaking, that if the plaintiff would hire a horse to one *English*, *English* would redeliver him.

There the point of inquiry was, not to whom the credit was given, but whether by operation of law *English* was liable on the contract; or whether, if liable at all, it was not a liability growing out of a subsequent wrong, as the converting the horse to his own use, which was a mere question of law. And the court being of opinion, that *English* was liable to an action of detinue, on his implied promise upon the bailment to redeliver the horse, it was determined, the delivery, the implied contract for redelivery arising upon the act of delivery, and the undertaking by *Darnall*, being all coincident in point of time, and constituting one entire transaction, that the promise of *Darnall* was collateral.

But here the point of inquiry at the trial was, *to whom the credit was given?* Which was purely a question or inference of fact from the evidence, to be found by the jury, upon which the legal responsibility of the appellant on his promise depended.

The court, therefore, did right in refusing to give the direction prayed; which if they had done would have been to decide the fact, that the credit was given to *Berrett*, and to take from the jury a question which it was their province to decide, on a consideration of all the circumstances of the case.

Much stress has been laid on the circumstance that *Berrett* was debited on the books of the plaintiff, as tending to show that the credit was given to him. But however strong it may be supposed, it was only a circumstance to be submitted, with all the other evidence in the cause, to the jury—as in *Anderson vs. Hayman*, 1 *H. Blk.* 120, which is very similar to this case.

With the finding of the jury, whether right or wrong on the evidence, we have nothing to do, the case is not before us on a motion to set aside the verdict. The question, which we are called upon to decide, is whether it was a matter fit to be left to the jury? And we think it was.

JUDGMENT AFFIRMED.

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Drake *vs.* Hudson & Franciscus.—June, 1826.

D & F, owners of the schooner *Superior*, sent her to *Havana*, consigned to P, where she arrived on the 3d March 1816. P, having discharged his duties as consignee, on the 17th of April, paid the then customary duties at the custom house at *Havana*; and he made up his accounts accordingly, and transmitted them to D & F, on the vessel's return. It appeared by parol evidence, that the *intendant* of *Havana*, by an order stated to be *dated* the 1st of March 1816, but not made public till some time after, directed that vessels entering that port, after the said 1st of March, should pay an additional duty, and that the consignees there had been compelled to pay this duty; and that among them P, as the consignee of the *Superior*, was called on to pay it in the November following, when it was paid by P's house. In an action of *assumpsit* by P, against D & F, to recover the amount so paid—*Held,* that he was individually entitled to recover, although the payment was made by his house. That a consignment transfers not only the power, but is a request to the consignee to pay all charges to which the vessel may be liable, at her port of delivery, and for such charges the consignee, if he acts in that character, becomes personally liable.

Held also, that though it was clear from the evidence, that the order of the *intendant* at *Havana,* under which the additional duty was paid, was in writing, still its contents might be proved by parol, and that it was not necessary to prove it by an authentic or sworn copy—the rule which requires this last proof, being applicable only to such foreign laws, or public edicts, of which a regular record is necessarily presumed to have been kept.

Held also, that although the contents of the order could not legally be proved by parol, yet that payments under the order might be so proved, as such payments established the fact of the amount of duties payable at *Havana,* and the usage or custom to pay them; and a usage or custom may be proved by parol, whether it originates in a public written law, or not.

Appeal from *Baltimore* County Court. *Assumpsit* for money paid, laid out and expended; money lent and advanced, and on an *insimul computassent.* The defendants, (the appellees,) pleaded *non assumpsit,* and issue was joined. At the trial the plaintiff, (the appellant,) offered evidence, that the defendants, together with a certain *Carston Newhouse,* who was then alive, but not alive at the institution of this suit, were owners of a vessel called the *Schooner Superior*; that in the early part of the year 1816, the said vessel was sent with a cargo by the said owners to the *Havana,* consigned to the plaintiff; and that in the latter part of the month of March 1816, it was a matter of general notoriety at *Havana,* that the consignees of all vessels which had come into the port subsequently to the 1st of March 1816, were required by a municipal regulation, or order of the intendant of that port, to pay double tonnage-duty on all vessels which had so arrived after said 1st day of March; that is to say, an additional duty of five and a half rials per ton, over and above the regular duty of the same amount, which had been before the usual and accustomed duty. That this additional duty had actually been paid in several instances by the witness, who was offered to prove the general notoriety of the existence of the duty, to the consignees, with whom he settled his accounts, and under whose care were the vessels, of which he was supercargo. The plaintiff further read in evidence the commission which issued out of *Baltimore* county court on the 28th of February 1822, to certain persons of the city of *Havana*, in the Island of *Cuba*, for the purpose of taking testimony, with the interrogatories and depositions returned with the commission, viz. The deposition of *Jose Manuel de Lorio*, merchant in the city of *Havana*, who deposed, in answer to the second and third questions, that "he recollects that the *American* schooner *Superior*, (the vessel named above,) captain *Barry*, arrived here in the port of *Havana* on the 3d of March 1816; that the house of *James Drake* (the plaintiff,) paid the tonnage-duty on said schooner at the rate of five and a half rials per ton, making, on 289 tons, $198 and five and half rials. These duties were paid at the custom-house on the 17th of April of said year. Answer to the fourth question—He knows of an order of the intendant of this city, *dated* 1st of March 1816, but not communicated to the public at that time, in virtue of which all vessels that had come into this port subsequent to the 1st of March 1816, must pay double-tonnage duty; that is to say, eleven rials per ton, instead of five and a half rials. He knows that all the consignees of vessels, entered subsequent to the 1st of March 1816, were obliged to pay the arrear; and in consequence, *James Drake* was called upon to pay, and did pay at the custom-house, on the 14th of November 1816, the additional duty of five and a half rials per ton on the said schooner *Superior*, making the sum of $198, five and a half rials. He also knows that this sum is still due to *James Drake* by the owners of the said schooner." The deposition of *John B. Fronty*, clerk in the house of Messrs. *Drake* & *Mitchell* in the city of *Havana*, deposed, in answer to the second question, that "he recollects that a certain tonnage-duty was paid by the house of *James Drake*, on account of the *American* schooner *Superior*, which arrived in this port on the 3d of March 1816, amounting to $198, and five and a half rials. This duty was paid on the 17th of April 1816, at the custom-house, at the rate of five and a half rials per ton, the schooner measuring, as per register, 298 tons. Answer to the third and fourth questions.—He knows that the house of *James Drake* was called upon to pay an additional tonnage-duty for said vessel of 5½ rials per ton, in virtue of a new order of the intendant, not made known at the time the first payment was made; and that although the vessel's accounts were closed and sent, the house had to pay on the 14th of November 1816, $198 and five and a half rials, at the custom-house for this additional duty. That the order of the intendant comprehended all foreign vessels which had entered this port subsequent to the 1st of March 1816. He knows that this last payment remains still due to the house of *James Drake*, by the owners of the said schooner." Upon this evidence the defendants prayed the court to direct the jury, that inasmuch as the above deposition of *Jose Manuel de Lorio* states, that the "order of the intendant" of *Havana*, which imposed the additional duty, "was *dated* the 1st of March 1816," the jury were bound to infer that the said order was in writing, as originally issued by the intendant, and that, consequently, no parol evidence could be admitted to prove the existence of such an order, or the payment by the plaintiff, for the use of the defendants, of any duty imposed by such order; and that the jury must, therefore, find their verdict for the defendants. This direction the Court, [*Archer*, Ch. J. and *Hanson*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

R. B. Magruder, and *Krebs*, for the Appellant, contended, 1. That whether the order of the Intendant of *Havana*, mentioned in the bill of exceptions, was *in writing* or not, was a question *of fact* for the jury; and that, therefore, the *absolute* direction of the court was erroneous. 2. That admitting the jury were bound to infer that the order was in writing, still parol evidence was admissible, under the circumstances of the case, to prove its existence, and, therefore, the absolute direction was erroneous. 3. That even if the order was in writing, still as it was not proved to have been in writing as a *public edict*, but may have been the result of instructions from the governor of *Cuba*, it might have been proved by parol. 4. That whether the order was a public edict in writing, or not, the appellant might legally offer parol evidence of any *payments* he might have been obliged to make for the use of the appellees, on account of any *duty* imposed by such order, or which by any usage of trade, or regulation at *Havana*, the appellant, as consignee, was compelled to make.

On the *first* point, they cited *Wilson vs. Dickson*, 2 *Barn. & Alder.* 10. *Marine Insurance Company of Alexandria vs. Young*, 5 *Cranch*, 187. *Jackson vs. Schoonmaker*, 2 *Johns. Rep.* 234.

On the *second* point—*Church vs. Hubbart*, 2 *Cranch*, 226, 237.

On the *third* point—*Church vs. Hubbart*, 2 *Cranch*, 226. *Livingston vs. Maryland Insurance Company*, 6 *Cranch*, 274.

On the *fourth* point—*Livingston vs. Maryland Insurance Company*, 7 *Cranch*, 512. *Smith vs. Elder*, 3 *Johns. Rep.* 105. *Grant vs. M'Lachlin*, 4 *Johns. Rep.* 34. *Van Omeron vs. Dowick*, 2 *Campb.* 42.

Frick, for the Appellees. The appellant contends, that having paid money for the appellees under a compulsory order of the Intendant of the *Havana*, which order is said, by one of the witnesses, to be *dated the* 1*st of March*, it does not necessarily follow that the said order was in writing, and therefore the court below should have submitted the question to the jury. This position confounds the admissibility of evidence with the effect. The latter is for the jury, the former for the court. If there was any room to doubt the nature of this order, the absolute direction of the court was erroneous. But the court say that this order, from the very terms used, was a written order, and whether they erred or not in so saying, is the inquiry? And they contend also, that admitting the order to have been in writing, yet parol proof of its contents was admissible, unless at least it was proved to be in writing, as a *public edict*. This is contrary to the elementary principle of evidence, that requires the best the nature of the case admits; for no evidence can be given which, in its nature, supposes still greater evidence behind in the party's power. 1 *Phill. Evid.* 167. Here an order is shown general in its nature, being a maritime or revenue ordinance, and this order is proved to be written. How then does the case in *Livingston vs. Maryland Insurance Company*, 6 *Cranch*, 274, apply? If they be not proved to be written, then parol proof may be adduced. It denotes the distinction between the written and unwritten law of a foreign country, and it is only the latter which may be proved by parol. *Kenny vs. Van Horne*, 1 *Johns. Rep.* 394. *Hulle vs. Heightman*, 4 *Esp.* 79. *Condy's Marsh.* 706, *(note.)* *Miller vs. Heinrick*, 4 *Campb.* 155. But this is said not to be an edict. What then is it? See the word in *Johnson*; it is there said to be "a law promulgated in writing," &c. And Ch. J. *Marshall* treats all foreign laws as edicts. *Church vs. Hubbart*, 2 *Cranch*, 187. As to the giving parol evidence of the payment of money under such an order admitted to be in writing, which is not produced, no legal apology offered for the nonproduction, no opportunity afforded to the appellee to test the legality, the propriety, or the *vis major* of such order, not even its *genuineness*, no authority has or can be produced to support such a position. If the money was paid under a usage of trade, as is assumed in the appellant's *fourth* point, then the position has some weight. But the term order, forbids the notion or idea of a usage in this case—"The true test of a commercial usage, is its having existed long enough to have become generally known, and to warrant a presumption that contracts were made in reference to it." *Renner vs. Bank of Columbia*, 9 *Wheaton*, 591. That it was *a regulation* at *Havana* is admitted; and indeed one of the witnesses speaks of it as such. But foreign commercial regulations cannot be proved by parol. *Condy's Marshall*, 706, *(note* a,*)* and the reference. Besides, the relation of shipper and consignee had ceased between the parties—the vessel's accounts had been closed and sent when this payment was made. From a voluntary payment for a third person no assumpsit can arise. But, says the appellant, it was a compulsory payment. And how? Under the order of the intendant? And here the *first* point again recurs—Was this order in writing or not? See *Johnson's Dict.* The meaning of DATE, is—1. The time when a letter is written, &c. 2. The time when any event has happened; and TO DATE, is to *note* the time when any thing is written or done. Therefore, any thing *dated*, hath the time *noted* when it was written or done. How noted? Thus: *quo tempore scriptum est.* For this see *Ainsworth*, under the word *date.* To make it plain, he asks—What *date* doth it bear? And renders it in Latin; *quo tempore scriptum est.* Then in the same lexicon refer to the Latin *datus*, and it is said to mean given, granted, DATED *as a letter;* and for illustration quotes *Cicero* & *Plautus*, *datum pridie.* The surest guide is etymology, where the import of words hath not been abused or perverted by modern convenience; as is not the case in this instance. See *Minshew's* Lexicon, (A. D. 1625,) which contains also the exposition of the terms of the *English* law: "a *date*" *of writing*, (as if it could be coupled with nothing else,) or *edition of a* writ—*a lat.* DATUM; i. e. given out, *quia datur* SCRIPTO *autoritas, et* DIES *mensis et anni datur, ac etiam* SCRIPTUM *hominum* MANIBUS, *datur et traditur*, &c. &c. See the same, supported by analogous reference to other languages ancient & modern, *loc. cit.* Here the word has a technical meaning, "the edition of a writ," (it is not doubted that means a writing,) and that induces the further inquiry, whether before or since the days of *Minshew*, lawyers have ever referred to any thing dated, that did not necessarily assume it a writing. *Vide* the case of *Pugh vs. Duke of Leeds*, *Cowper*, 434. The question there hath no reference to this; but the words are in point, and furnish the illustration desired. The matter concerned a lease, and the difference between a *datu* & a *die datus*, i. e. of the lease. Why not "*from the leasing* or *the day of the leasing?* Because it was written, and was dated. Suppose it a verbal lease, is it not a pleonasm to say" the day of the date "of the lease." It is a pleonasm if the subject matter be *not* written, since, if it means only the time when done, "*the day*" is enough. In law a will may be verbal, so a lease, an agreement, &c. may be verbal; and we speak of the *day* when the will, the lease, &c. was made. But if we speak of a will, of a lease, &c. that was or is *dated*, what lawyer ever resisted the conclusion that it was first written? *Blackstone* says, "lastly comes the conclusion, (of a deed) which mentions the *date* of the deed, or the time of its being given or executed." This is the uniform application, the most general and reputable use of the word; and if any divided use can be established, yet the canons of criticism fortify the positions taken. Consult the analogy and etymology of the language, and if neither perspicuity nor analogy support it, (which it is maintained they do,) the meaning, most conformable to ancient usage, must be taken and preferred. *Campbell's Philo. Rhetoric.* If the latter then have any weight, and the interesting Diversions of *Purley* mny be adduced as authority, see the II vol. p. 22. "A *date*, is merely the participle *datum*, which was written by the *Romans* at the bottom of their epistles." Yet, say that standing alone the word is equivocal, the rule then is that it must depend upon the context or subject matter. It is an order that is dated; now, an order in itself may be either verbal or written, and when standing by itself it is always supposed to be verbal; and if verbal, is said to be issued, or given, &c. as by an order of the governor, issued on the 1st of March. But couple this order, command, edict, or whatever it might be termed, with a date, (say that it is dated,) and can a philologist withhold the inference that it is written. But go to the *whole* subject matter. How could it have been a *verbal* order of the 1st of March, if *not known on that day*, but *afterwards* promulgated? For the witness says, the order was not *known* till after the 17th of April. Here is an order to pay additional duties, not customary—in its nature a general order, not applicable to the customs alone at *Havana*, but to all the ports of the island. Would the governor be most likely to resort to a circular, or would he send a verbal messenger around the whole island? When was such a preposterous thing ever done in like case?

Mitchell, on the same side, cited *D'Arcy vs. Lyle*, 5 *Binny's Rep.* 441, cited in 2 *Liv. on Agency*, 23, to prove that a consignee is not a general but a special agent; and that if an agent pay an illegal or exorbitant demand, it cannot be recovered. The agency of the plaintiff had terminated, and he could not recover in this form of action. It is proved that the money was not advanced by the plaintiff, but by the firm of *Drake* and *Mitchell*. The suit, therefore, should have been in their names. To show that foreign laws are presumed to be promulgated in the same manner as our own laws are, he cited

Banoorgee vs. Hovey, 5 *Mass. Rep.* 41. *Church vs. Hubbart*, 2 *Cranch*, 226, (*Martin's* Argument.) 1 *Phill. Evid.* 301, (*notes.*) *Smith vs. Elder*, 3 *Johns. Rep.* 113. *Exall vs. Partride*, 8 *T. R.* 310; and *Spurrier vs. Elderton*, 5 *Esp. Rep.* 2.

R. B. Magruder, in reply.

DORSEY, J. delivered the opinion of the Court. The appellees, the owners of the schooner *Superior*, despatched her, with a cargo, to the *Havana*, where she arrived on the third day of March 1816, consigned to the appellant, who having discharged his duties as consignee, on the 17th of April paid at the custom-house a duty of five and a half rials per ton, (the amount always payable, anterior to the first of March 1816,) made up his accounts accordingly; which, on the return of the schooner, were transmitted to the consignors at *Baltimore*. It is in proof, by competent witnesses, that by an order of the intendant of *Havana* dated said first day of March, but not made public until sometime after, all vessels entering that port were required to pay a duty of eleven rials per ton, instead of the amount heretofore demandable. That the consignees of all vessels, which arrived after the said first day of March, had been obliged to pay the said increased impost on tonnage, and that supercargoes settled with them accordingly. That in November 1816, the appellant was called on, and had to pay the additional duty, amounting to the sum of $198 and five and a half rials. For the recovery of which sum the present action was instituted.

This claim is objected to on two grounds: *First.* That the appellant paid this money as a mere volunteer, and cannot become the creditor of the appellees without their consent. This objection is entitled to no consideration. The very act of consignment, transfers not only the power, but is in fact a request to the consignee to pay all charges to which the vessel may be necessarily subjected at her port of delivery. For the payment thereof, the consignee pledges his personal responsibility; to him, and not to the consignors, is the credit given at the custom-house.

The *second* objection is, that "no parol evidence can be offered of the order of the first of March 1816, or of any payment made under the same;" and of this opinion were the court below, and so instructed the jury.

That this order was in writing, we think most manifest from the proof in the cause; but that it is of such a character, that its contents can only be proved by an authentic or sworn copy, we cannot admit. This strictness, in proving the laws of a foreign country, is only applicable to laws or public edicts, of which a regular record is necessarily presumed to have been kept. The order of the first of March is not of this description—It is a mere instruction or rule prescribed by the intendant of *Havana*, for regulating the duty of the custom-house officers, and may not be any where recorded. That orders or instructions of this kind, given in a foreign country, may be proved by parol, *vide Livingston & Gilchrist, vs. The Maryland Insurance Company*, 6 *Cranch*, 280, and 1 *Phill. Ev.* 301, *(note* a.*)* But even admit, that the order spoken of in this case were to be considered as a law or public edict, the contents of which it is inadmissible to prove by parol, yet it appears to this court, that the testimony offered by the plaintiff, (that under an order of the intendant of *Havana* the custom-house officers did always demand and receive this double tonnage duty upon all foreign vessels arriving after the first of March 1816,) was admissible before the jury, without any other proof of the order itself. It establishes the fact, or call it if you please an usage or custom, as to the amount of duties payable there; which usage or custom may be proved by parol, whether arising under a public written law or not. See the case of *Livingston and Gilchrist vs. The Maryland Insurance Company*, 7 *Cranch*, 539 and 1 *Phil. Ev.* 301, *(note* a.*)* The great inconvenience and injustice, which might flow from the sanction of a different principle, is most obvious. We therefore dissent from the opinion given by the court below, and reverse their judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

WYMAN *vs.* GRAY.—June, 1826.

In an action of *assumpsit* by W, as the endorsee of a promissory note, against G, the maker, it appeared that G was the president of an incorporated manufacturing company; that the payees of the note sold merchandise to the company, and sent it, with a bill of parcels, to the company, in which they charged them as their debtors, and that G afterwards sent the payees the note sued upon, for the amount signed by him, with the addition to his signature of the words "*Prest.*" &c. which note was endorsed, after it fell due, to W, the plaintiff—*Held*, that W was not necessarily entitled to recover. That if the payees of the note, in selling to the company, gave credit to them by which the debt became theirs, and not to G, the defendant, his note, given in consideration of such debt, was but a promise to pay the debt of another, and void for the want of a sufficient consideration.

The statute of frauds which requires an agreement to pay the debt, &c. of another, to be in writing, was not intended to make good, agreements, though in writing, which would not be good at the common law, a consideration therefore is necessary to their validity.

And to support an agreement of this kind under the statute, a good consideration must not only exist, but it must appear in the agreement itself, and cannot be supplied by parol.

An agent may so contract as to bind himself personally; and in this case the payees of the note might, with a knowledge that G was the agent of the company, when they sold the merchandise in question, have refused to give them credit for it, and elected to deliver it on the individual credit of G; and if he had, under such circumstances, agreed to bind himself personally, it would have been an agreement for a sufficient consideration.

In an action upon a promissory note, by the payee, or by a holder to whom it is endorsed after it becomes due, it is always competent to the defendant to prove, either a want or a failure of consideration, the holder in such a case standing in the place of the payee, and being subject to all the equity of the maker, and parol evidence is admissible for this purpose.

If the fact had been that G was a stockholder of the company, his individual agreement to pay a debt of theirs would be void for the want of consideration; because his liability, as a member, would be a liability only in his corporate capacity, and binding only to the extent of his corporate funds.

Whether the credit on the sale of the merchandise was originally given by the payees of the note to the company, or to G individually, and whether the note was passed on account of that transaction or not, were *Held* to be questions of fact for the jury, to be decided upon all the evidence.

APPEAL from *Baltimore* County Court. *Assumpsit* on a promissory note, brought by the endorsee against the maker.

The declaration contained a count on the note, and the usual money counts. The general issue was pleaded.

1. At the trial the plaintiff, (the appellant,) gave in evidence the following promissory note: "*Baltimore*, 11th Feb. 1819. $661 50. Six months after date, I promise to pay to the order of *Bicknell & Boies*, six hundred and sixty-one $\frac{50}{100}$ dollars, for value received.

Edward Gray, Pre'st. *Pataps'o Man'g. Co.*"

(Endorsed,) "Pay the within note to *Samuel Wyman.*

Bicknell & Boies."

And proved the signature of *Gray*, the defendant in this cause; and that *Daniel D. Bicknell* and *Jeremiah S. H. Boies* were, at the time of making said note, and for a long time after, partners in trade, under the name, style and firm of *Bicknell & Boies*, and that after the note became due, they endorsed and delivered it to the plaintiff for a full and valuable consideration. The defendant then offered evidence to prove, that before and at the time, and after the making of the note, he was the President of the *Patapsco Manufacturing Company*, and that on the eleventh day of February 1819, *Bicknell & Boies* sold and delivered a quantity of goods to the said company, and sent them with the following bill of parcels: "*Baltimore*, 11th February, 1819. The *Patapsco Manufacturing Co. Edward Gray*, Agent, bou't. of *Bicknell & Boies*, 11 bales cotton, 2450 lb. a 27 cts. $661 50—6 months." And that in a few days afterwards, *Gray* sent to *Bicknell & Boies*, the note in question; and that when said goods were sold, *Bicknell & Boies* knew that *Gray* was president of said company. He also offered to prove, that at the time of making said note, the said company was in good credit, and able to buy goods on their own credit, and that he *Gray* was not in good credit. And further offered in evidence the charter of incorporation of said company, and the following bye-laws, which constituted the president as their agent, &c. To which evidence the plaintiff, by his counsel excepted, as tending to vary by parol a written contract. But the Court, [*Archer*, Ch. J. and *Hanson*, A. J.] being divided in opinion, they refused to sustain the objection; and the evidence went to the jury. The plaintiff excepted.

2. The plaintiff then prayed the court, upon the whole evidence, to instruct the jury, that the plaintiff was entitled to recover; which instruction, the court, being divided in opinion, refused to give. The plaintiff excepted.

3. The defendant then prayed the court, to instruct the jury—1st. If the jury shall believe from the evidence that the said note was given by *Edward Gray*, as agent for said company, and not on his own private account, and that it was endorsed by the payees after it became due to the plaintiff, that they must find a verdict for the defendant. 2d. If the jury should believe from the evidence, that no consideration was received by *Edward Gray* for said note, although a consideration was given therefor, to the *Patapsco Manufacturing Company*, and that said note was endorsed to the plaintiff, by the payees, after it became due, that they must find a verdict for the defendant. Both of which instructions, the court, being divided in opinion, refused to give. The defendant excepted.

4. The plaintiff offered in evidence the note herein before stated, with the endorsement thereon; and proved the handwriting of the drawer and endorsers to be the proper handwriting of *Edward Gray* and *Bicknell* and *Boies* respectively. To the admission of which, as legal evidence in the cause, the defendant objected; but the court overruled the objection, and admitted the note in evidence to the jury. The defendant excepted. The verdict and judgment being for the defendant, the plaintiff appealed to this court.

The cause was argued, upon the plaintiff's bills of exceptions, before Buchanan, Ch. J. and Earle, and Dorsey, J.

Meredith, for the Appellant, contended, 1. That the appellee was personally liable upon the face of the note. 2. That the parol proof was inadmissible. 3. That upon the whole evidence in the cause, the appellee was personally responsible.

1. On the legal construction of the note itself, the appellee is personally responsible. The words "I promise to pay," import an individual engagement. *March vs. Ward, Peake's N. P.* 130. *Clark vs Blackstock, Holt's N. P.* 474. *Hall vs. Smith*, 1 *Barn. & Cres.* 407, (8 *Serg. & Lowb.* 112.) This

absolute individual promise is not affected by the addition to the signature; and although the appellee was agent or president of the company, he might make himself personally liable. *Appleton vs. Binks, 5 East,* 148. *Taft vs. Brewster,* 9 *Johns. Rep.* 334. *Duvall vs. Craig,* 2 *Wheat.* 46. These were cases of sealed instruments, but their construction is the same as parol agreements. 2 *Gall. Rep.* 461. 1 *Ryan & Moody's Rep.* 229. *Thomas vs. Bishop,* 2 *Stra.* 955. *Burrel vs. Jones,* 3 *Barn. & Ald.* 47, (5 *Serg. & Lowb.* 223.) *Thatcher vs. Dinsmore,* 5 *Mass. Rep.* 299. *Forster vs. Fuller,* 6 *Mass. Rep.* 58. *Chitty on Bills,* 36, (7th *Ed.* 1821, *note* 1.)

2. The parol proof was inadmissible. 3 *Starkie's Evid.* 995, for the general rule. It was inadmissible to show the character in which the party contracted, to be different from that expressed in the written instrument. *Frontin vs. Small,* 2 *Ld. Raym.* 1418. S. C. 1 *Salk.* 96. *Wilkes vs. Pack,* 2 *East,* 142. *Preston vs. Merceau,* 2 *W. Blk.* 1249. *Meres vs. Ansell,* 3 *Wils.* 275. So it is inadmissible to show the extent or legal operation of a writing, or to control it. *Carter vs. Bellamy, Kirby's Rep.* 291. The rule is as applicable to bills and notes as to other written instruments. *Free vs. Hawkins,* 1 *Moore,* 535. 2 *Stark. Evid.* 279. *Kaimes vs. Knightly, Skin.* 54. *Leadbitter vs. Farrow,* 5 *Maule & Selw.* 347. *Dukes vs. Dow, Chitty on Bills,* 62, (*note.*) *Thomas vs. Bishop,* 2 *Stra.* 955. *Siffkin vs. Walker,* 2 *Campb.* 308. *Murray vs. Somerville, Ib.* 99. *Hoare vs. Graham,* 3 *Campb.* 57. *Moller vs. Living* 4 *Taunt.* 102. *Campbell vs. Hodgson,* 1 *Gow,* 74. *Rawson vs. Walker,* 1 *Stark. N. P. Rep.* 361.

3. If the instrument imports personal liability, knowledge of the agency makes no difference. *Leadbitter vs. Farrow,* 5 *Maule & Selw.* 345. *Mayhew vs. Prince,* 11 *Mass. Rep.* 54. *Paterson vs. Gandasequi,* 15 *East,* 67.

4. The corporation is not liable. Act of Ass. 1815. *ch.* 140, *s.* 1. If an agent undertake to contract for an individual or corporation, and contract in a manner that is not legally binding on the principal, he is personally responsible. *Mott vs. Hicks,* 1 *Cowen,* 536. *Mayhew vs. Prince,* 11 *Mass. Rep.* 55. *Taft vs. Brewster,* 9 *Johns. Rep.* 334. So if he act without authority, or exceed his authority. *Harrison vs. Jack-*

son, 7 *T. R.* 206. *Dusenbury vs. Ellis*, 3 *Johns. Cas.* 70. *White vs. Skinner*, 13 *Johns. Rep.* 307. *Randall vs. Vanvichten*, 19 *Johns. Rep.* 60. *Tippets vs. Walker*, 4 *Mass. Rep.* 595. *Paley on Agency*, 303. 2 *Liv. on Agency*, 355. *Leadbitter vs. Farrow*, 5 *Maule & Selw.* 345.

Raymond, for the Appellee, cited 1 *Com. Cont.* 10, and *Rathbon vs. Budlong*, 15 *Johns. Rep.* 1.

Meredith, in reply, cited *Castling vs. Aubert*, 2 *East*, 325. *Rob. on Frauds*, 229. *Stephens vs. Squire*, 5 *Mod.* 205. *Paterson vs. Gandasequi*, 15 *East*, 66. *Patapsco Insurance Company vs. Smith*, 6 *Harr. & Johns.* 166; and *Leonard v. Vredenburgh*, 8 *Johns. Rep.* 29.

Buchanan, Ch. J. delivered the opinion of the Court. This case comes up on two bills of exceptions. The first count in the declaration is on a promissory note, given by the appellee to *Bicknell* and *Boies*, and endorsed by them to the appellant, with other counts for money lent, &c. money had and received, and an *insimul computassent.*

The appellant at the trial produced and proved the due execution and endorsement of the note on which the action is founded, and that it was endorsed to him by *Bicknell* and *Boies*, after it became due, and there rested his case.

The appellant then offered evidence to prove, that before, at the time, and after the making of the promissory note, he was the president of the *Patapsco Manufacturing Company*; that on the eleventh day of February 1819, (the day on which the note purports to bear date,) *Bicknell* and *Boies* sold and delivered a quantity of goods to the said company, on a credit of six months, amounting to $661 50, (the exact amount of the note,) and sent them with a bill of parcels, headed—"*The Patapsco Manufacturing Company, Edward Gray* Agent, bought of *Bicknell* and *Boies.*" That a few days afterwards he sent to *Bicknell* and *Boies* the note in question; that when the goods were sold, they knew he was the president of that company; that at the time of making the note, the company was in good credit, and able to buy goods on their own credit, and that he was not in good credit; and also further offered in evidence, the charter of incorporation, and bye-laws of the company, (which bye-laws are not in the record.) The whole of which evidence was objected to by the counsel for the appellant, as tending to vary a written contract; but the court being divided in opinion, the objection was not sustained, and the evidence was suffered to go to the jury; which forms the subject of the *first* bill of exceptions.

The counsel for the appellant, then prayed the court to instruct the jury, that the appellant was entitled to recover; but the court being again divided, the instruction prayed for was not given; which forms the subject of the *second* bill of exceptions.

These bills of exceptions involve a twofold inquiry—1st. Whether the evidence offered on the part of the appellee was admissible for any purpose? And 2d. Whether, being admitted, the court ought to have instructed the jury, under the circumstances of the case, that the appellant was entitled to recover? which will be briefly examined.

The note, in the body of it, purports to be the individual note of the appellee. The promissory part of it is in these words—"Six months after date I promise to pay to the order of *Bicknell* and *Boies*, six hundred and sixty-one dollars and fifty cents, for value received." And it is signed by the appellee in his own name, with the addition of the words "*President Patapsco Manufacturing Company.*"

There is no doubt an agent may so contract, as to render himself personally responsible, but he may also so deal as to guard himself against liability; and if in this case the note were to be considered as not creating a personal responsibility, but as imposing the whole liability upon the *Patapsco Manufacturing Company*, it would follow, that the action could not be sustained. But it is asserted to be the personal undertaking of the appellee, as apparent upon the face of it, and not subject to be explained or varied by extrinsic evidence, so as in any manner to change its character, or divert the legal operation of it from the maker to his principal. Considered in that aspect, and treating it as the individual note of the appellee, (the ground on which the appellant seeks to place it,) there could be no question of his right to recover, if the case rested solely on that ground.

But it is essential to the validity of every parol contract or agreement, whether verbal or written, that it be founded upon a sufficient consideration, otherwise it is considered in law as *nudum pactum*, and cannot be enforced.

And this rule applies as well to a promissory note in the hands of the payee, or endorsee claiming by endorsement after it became due, as to any other simple contract.

And although a promissory note, which purports to have been made for value received, carries upon its face *prima facie* evidence of consideration; yet in a suit by the payee, or holder, to whom it was endorsed after it became due, it is always competent to the defendant to prove either a want or a failure of consideration, the endorsee in such case standing in the predicament of the payee, and holding it subject to all the equity of the maker.

Testimony, therefore, on the part of the appellee, was clearly admissible for the purpose of showing on what account the note in question was given, in order to prove the absence of a sufficient consideration; or what, in such a case, would become of the well known principle, that all parol contracts or agreements without consideration are void.

There are indeed exceptions to the rule in favour of holders of promissory notes and bills of exchange, which have come into their hands in a due course of negotiation, arising out of the peculiar character of these instruments, but which do not apply to this case, the appellant claiming by endorsement after the note became due. And if it was given for a previously existing debt of the *Patapsco Manufacturing Company*, the establishment of that fact would be a full defence to the action, in the absence of any other consideration, for the purpose of proving which, the evidence offered was properly permitted to go to the jury.

Bicknell and *Boies* might, with a perfect knowledge that the appellee was acting as the president of the *Patapsco Manufacturing Company* at the time the goods were sold, have refused to give credit to that company, and elected to deliver them on the individual credit of the appellee alone; and it was quite competent to the appellee to have substituted his own responsibility for that of the company; and if that was the character of the transaction, and the note was given at the time, or being so liable, the appellee afterwards passed his note on that account, it was a good and sufficient consideration.

But if the credit was originally given to the company, and not to the appellee, by which it became the immediate debt of the company, and the note was afterwards given in consideration of that debt, without any new or superadded consideration, moving between *Bicknell* and *Boies*, and the appellee, then it was a promise to pay the debt of another, and void for want of a sufficient consideration, the statute of frauds requiring an agreement to answer for the debt, &c. of another, to be in writing; not intending, or having the effect to make any agreements good, though in writing, which at the common law would be bad, but leaving them to be judged of by the common law, as all other agreements merely in writing are. And there is not only no evidence in the record of any consideration moving to the appellee, but none *de hors* the note, if offered, could properly have been received, the consideration forming a constituent part of every agreement, and the statute requiring the agreement to be in writing, meaning not a part only, but the whole of the agreement.

The case of *Wain and another vs. Warlters*, 5 *East*, 10, which was elaborately discussed by the judges, is full to this effect. It was an action brought upon an instrument of writing in these words: "Messrs. *Wain* & *Co.* I will engage to pay you by half past four this day, fifty-six pounds and expenses on bill, that amount on *Hall.*" Signed, *John Warlters.* The declaration avers, that it was given in consideration of forbearance to sue one *Gore* and *Hall* for that amount due him on a bill of exchange; and at the trial the plaintiff offered parol evidence to prove the consideration of forbearance. But it was held, that for the want of the consideration appearing on the face of the instrument, it stood as a simple agreement to pay the debt of another without consideration, and was therefore *nudum pactum*, and void, and the plaintiff was *nonsuited;* and upon a motion for a rule to set aside the nonsuit, it was determined that the consideration ought to have been stated in the agreement, and could not be supplied by parol.

The suggestion, that if this note was in fact given for a debt due by the *Patapsco Manufacturing Company*, the appellee being the president of that company, it was given for his own debt, and therefore good, cannot be sustained.

The appellee, if liable at all for that debt, as president of that institution, was liable, not in his natural and individual, but in his corporate capacity alone, and that only to the extent of his corporate funds. But the charter of incorporation does not require that the president shall be a stockholder; and there is no evidence that the appellee was a stockholder at the time of this transaction. If, therefore, it was originally the debt of that institution, he was not answerable for that debt, or any part of it, in any capacity, from any thing appearing in this record.

In this case, however, whether the credit was originally given to the *Patapsco Manufacturing Company*. or to the appellee individually, and whether the note was in truth passed on account of that transaction or not, were questions of fact, proper to be decided by the jury, upon the whole of the evidence in the cause, and not by the court. The court, therefore, did right in not instructing the jury that the appellant was entitled to recover.

JUDGMENT AFFIRMED.

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Newson's Adm'r. *vs.* Douglass.

Douglass vs. Newson's Adm'r.—June, 1826.

In an action of *assumpsit* by *C*, claiming to be the owner of the property insured, against *D*, to recover the amount received by D, upon certain policies of insurance effected in his name, *for account of whom they might concern.—Held*, that it was competent for D to show that the policies were effected by him as the agent of a third person, and that the letters of that person to D, directing the insurances, were admissible evidence of that fact.

The words, "whom it may concern," in a policy of insurance, are technical, and are understood to mean not any and every body who may chance to have an interest in the thing insured, but such person only as is in the the contemplation of the contract. They suppose an agency, and look solely to the principal in whose behalf, or on whose account the agent acts. Such principal is the person in the contemplation of the contract, and is the one whom it alone concerns; and his existence may be proved by extrinsic evidence.

No person can avail himself of a policy of insurance, not containing the general clause "whom it may concern," or one of similar import, but those named in the policy as the parties insured, or on whose account it is expressed to be made. But a policy in the name of one, with this general clause, will cover the interest of any person for whose benefit it is intended when effected, and who either previously authorises it, or subsequently adopts it—subsequent adoption in such a case being equivalent to a prior order for the insurance.

Where A authorises B to effect an insurance for him—or B, without authority, designs to insure for A, and in either case B directs a sole agent to insure in such sub-agent's name, with the general clause, the policy will enure to A's benefit, although his interest was not known to the sub-agent, or to the underwriters, in like manner as it would have done had it been immediately effected by B himself.

The plaintiff C, claiming title to the property insured under a bill of sale to him from the principal of the defendant D—*Held*, that it was not competent for D to show that such bill of sale was intended by his principal to defraud his creditors, however unfair C's conduct may have been in relation to it.

The sworn certificate of the captain of a vessel, insured by an agent, of the disbursements of the agent upon the vessel, is not evidence of such disbursements, in an action, against the agent by the principal, to recover the amount received by the agent upon the insurance; but the captain himself should be produced.

Interest is recoverable as of right upon contracts in writing to pay money upon a day certain, as upon bills of exchange or promissory notes, or on contracts for the payment of interest, or where the money claimed has been actually used, and upon bonds, &c. but in other cases it is a question entirely for the jury, to be decided according to the equity and justice between the parties, on a consideration of all the circumstances of the particular case as disclosed at the trial.

After the opinion of the court was delivered, and before judgment was entered, the appellant was permitted to dismiss his appeal.

CROSS APPEALS from *Baltimore* County Court. This was an action of *assumpsit* for money paid, laid out and expended; for money had and received, and for money lent and advanced. The defendant *(Douglass,)* pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiff, *(Newson's* administrator,) offered in evidence, that his intestate was the owner of the ship *Mohawk* at the time of his death; and that while such ownership continued in the representatives of the intestate, the defendant sent to the offices of *The Baltimore Insurance Company*, and *The Patapsco Insurance Company*, the following

orders for insurance. "*George Douglass* wants insurance for account of whom it may concern, on ship *Mohawk* and cargo, *James T. Harding* master, at and from hence to *Port-au-Prince*, against all risk. Say on vessel, valued thereat, $6000; on cargo $20,000. The *Mohawk* sails under a certificate of *American* ownership—is well fitted and found, and the captain a good officer. She will probably sail to day. In case of loss the amount to be paid to me. What premium, secured by *R. H.* and *W. Douglass?* That the said offices upon this order entered into the policies of insurance, which he also offered in evidence. That by *The Baltimore Insurance Company* was executed on the 26th of August 1817, whereby the said company insured "*George Douglass*, for account of whom it may concern, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth or shall appertain, in whole or in part, and every of them," &c at and from *Baltimore* to *Port-au-Prince*, upon the *cargo* of the ship *Mohawk*, to the amount of $18,000 at a premium of 2½ *per cent.* Another policy by the same company was executed on the same day, and in like manner and form as above mentioned, on the ship *Mohawk*, to the amount of $2,000 at a like premium. And the other policy by *The Patapsco Insurance Company* was executed on the same day, and in like form and manner, as above mentioned, on the ship *Mohawk*, to the amount of 4,000 at the like premium. The plaintiff further proved, that while said policies were in force, the said ship was lost by one of the dangers insured against, and that on said loss the said insurance companies on the 31st of December 1817, and 7th of March 1818, paid to the defendant, on account of said policies, the sum of $5,595 38. The defendant then, for the purpose of proving, that in effecting said policies of insurance the defendant acted as the agent and on account of one *Archibald Kane*, who it was admitted was dead, offered to read in evidence the following letters from said *Kane* to the defendant, viz. One dated at *Port-au-Prince* the 28th of June, 1817. "The sole object of this letter is to request you will make insurance for me to the amount of *twenty thousand dollars*, as follows: *ten thousand dollars* on coffee, valuing the same at *fifteen dollars* pr. cwt.

on Logwood *three thousand dollars*, valuing the same at *twenty-five dollars* per ton; and on the hull of the ship *Mohawk*, *seven thousand dollars*, on board the ship *Mohawk, Harding, master*, at and from *Port-au-Prince* to *Baltimore.* The *Mohawk* will sail in ten days." Another dated at *Port-au-Prince*, the 28th of June 1817. "The enclosed letter for insurance let it have your earliest attention. The ship *Mohawk* was formerly the *La Franchise*, under the *Haytian* flag, but during her last voyage to *New-York*, she obtained papers enabling her to sail under the *American* flag, though she did not get them early enough to clear out from *New-York* for this place. She is a fine ship, almost new, and coppered to high ballast mark. She was built at *New Bedford*, and is six years old. My object, on her arrival at *Baltimore*, is to sell or exchange her for a good schooner of about 800 bls; say, that will stow about 130 *a* 150 wt. coffee in bags, to be kept as a regular trader on my own account between this and *Baltimore.* I do not care much about her being coppered, as she never should lay here long enough to be injured by worms The ship is too large for my purpose, and her foreign duties and charges makes it ruinous. Is it not possible for you to make the exchange for me, on almost any terms, with some of your ship-builders? The *Mohawk* would do well to load for *Cadiz*, and there sell her. She is well found in every thing. Will you, my dear sir, sound, and see if any arrangement can be made on her arrival? She has cost me, first and last, $20,000, and I declare I should be willing to exchange her for a schooner value $5000. I shall write you fully by her, in the meanwhile you could make inquiries, &c. I shall do a great deal of business with you hereafter. Since the unfortunate failure of my northern friends, I shall do every thing with you? *and I beg particularly that all our affairs may be kept snug from every one.* I have lost several fortunes in supporting my friends, and I must now devote my time and attention to my own interest. With you, you will always find me punctual and correct, and with your good attention to my interest in *Baltimore*, I flatter myself I shall soon *look up* I write my friend by this conveyance that I shall merely send the *Mohawk* to you with wood, to return with lumber. I beg you will keep me regularly informed of your market for *German* goods. You know the kind fit for this market. Provisions and Yankee cargoes of fish are tumbling in from the N and Eastern states, and markets falling. I hope the *Mohawk* will sail in all next week." Another letter, dated at *Port-au-Prince*, the 5th of July, 1817. "Inclosed you have invoice and bill lading of coffee and logwood, shipped on board the *Mohawk*, *Harding*, master, amounting in *our currency* to $21,810 72, which you will dispose of when you think proper. I have determined the *Mohawk* shall return, having engaged with President *Petion* to furnish him with a quantity of pitch pine timber and boards, as per his letter herewith, and to which I ask your best attention. Capt. *Harding* is the stepson of my deceased friend Capt. *Newson*, who died here last month, and to him I shall continue the command of the ship. He will engage a friend of his as mate at *New-York*. On the arrival of the ship at *Baltimore* you will discharge the crew, the amount due them, if they arrive *in all this month*, will be a little under one thousand dollars, as per statement herewith. I wish you to take complete charge of the vessel in unloading and loading her, as Capt. *Harding* must go on to *New-York* to regulate some affairs, and will return to *Baltimore* in about ten days. I am well aware of your zeal, attention and economy, and I trust the *Mohawk*, will not be over twenty days in port. On her return she will have 10 sailors and an officer, and I wish you to put in provisions for the crew for only 60 days, and small stores for the cabin, say to amount of 60 or $70. Capt. *Harding* is in my full confidence, and will inform you his object in going on to *New-York*. The vessel wants nothing to make her voyage back here, excepting a few days caulking. On her arrival here I can put her in order, having the government store and arsenal rather in my favour. I leave every thing to your good management. When the 100 feet timber and boards are in, and the articles contained in my note, should she not be full, fill her up with white pine boards. I shall confidently look for her in this port in 60 days from this date. The return cargo to be insured out to *Port-au-Prince*; the vessel also to be estimated at *six thousand dollars*." Then follow the invoice signed by *Harding*, and the letter of president *Petion*, both dated the 4th of July 1817. Another letter, dated at *Port-au-Prince* the 9th of July 1817. "Inclosed you have duplicate for insurance on the *Mohawk* and cargo, which vessel sailed on Saturday evening the 5th inst. (this is Monday,) to which I beg your attention. I also inclose duplicate invoice and bill lading of her cargo. I have nothing further to add, only a *full confirmation* of my respects by her. Hoping soon to hear from you, and that you will keep *all my affairs snug between us.*" "Note for return cargo, ship *Mohawk*, *Harding*, master, to be shipped by Mr. *George Douglass* on my account and risk, under full insurance, to *Port-au-Prince*, 1000 barrels," &c. Another letter, dated at *Port-au-Prince* the 9th of July, 1817. "Your highly esteemed favour of 21st of June was handed me this morning by Mr. *Crocket*. Since my respects pr. *Mohawk* many herrings and soap have arrived, and as the herrings were intended for gover't. they do not now want them; or in other words, I think I can do better than to furnish them. In the event of my order per *Mohawk* not having been acted upon, the enclosed note for her return cargo you will please allow to take its place. The *India* goods and hkfs. I shall leave entirely to your good judgment, as you well know what this market is. I have merely stated the kind that are now in demand, and as no arrivals from *England* can be expected till Novr. or Decr. I calculate this will do well. The lumber for the president, as well as his tables, as stated in his letter enclosed to you pr. *Mohawk*, will have, I am sure, your best attention. If I had funds in your hands I would add considerably to the *India* goods. You may rest assured, my dear sir, should my funds not amount to my order, which I suspect they will not by several thousand dollars, you shall be in full remittances *within* 90 *days* from their sailing from your port. I do not expect that you will be willing to advance more, especially after the fate of my northern friends, but I can only say, *A. Kane is unexceptionable for all his engagements.* We have nothing new from *France* respecting this Island. This letter goes by the governor *Selby* for *New York*, which I hope may be in time to stop the herrings and soap." To the reading of these letters the plaintiff objected; but the Court, [*Archer*, Ch. J. and *Hanson*, and *Ward*, A. J.] overruled the objection, and permitted them to go to the jury. The plaintiff excepted.

2. The defendant then offered to read in evidence the following certificate, given by *James T. Harding*, for the purpose of showing the amount of disbursements paid by the defendant on account of the ship *Mohawk*, in order to have said disbursements deducted from the claim of the plaintiff, viz. "I *James T. Harding*, late master of the ship *Mohawk*, do hereby certify, that Mr. *George Douglass'* bill of disbursements against the ship *Mohawk*, when she left *Baltimore* in August 1817, amounted to twenty-eight hundred and ten dollars and sixty-seven cents, and that the same was just and correct. *New-York*, 9th October, 1824, *James T. Harding*."

State of *New-York*. City of *New-York*, Sct. *James T. Harding* of the said city, being duly sworn, doth depose and say, that the matters of fact set forth in the above certificate, to which he hath subscribed his name, is in all respects just and true; and further says not. *James T. Harding*.

Sworn to this 18th of October 1824, before me,

John Hildreth, Commr.

To the reading of which paper the plaintiff objected, there being no proof that *Harding* was dead; but the court overruled the objection, and permitted the paper to be read in evidence to the jury. The plaintiff excepted.

3. The plaintiff then prayed the court's opinion and instruction to the jury, that if they believed the plaintiff entitled to recover the amount received by the defendant on the policies stated in the preceding bills of exceptions, deducting the disbursements paid by the defendant on account of the ship insured by said policies, that then the plaintiff was also entitled to be allowed legal interest on said amount. Which prayer the Court, [*Archer*, Ch J. and *Ward*, A. J.] refused to give, being of opinion, and so instructing the jury, that whether interest should be allowed or not, was a question to be decided by them, and not by the court. The plaintiff excepted.

4. The plaintiff, in order to support the issue on his part, gave evidence, that the defendant handed into the *Baltimore*

Insurance Company, and *Patapsco Insurance Company*, two incorporated companies in the city of *Baltimore*, the orders of insurance stated in the plaintiff's first bill of exceptions, which were respectively accepted, and that the policies, also set forth in the first bill of exceptions of the plaintiff, were executed in due form by the said companies respectively. And further gave in evidence, that the said ship *Mohawk*, mentioned in the said policies of insurance, was the property of *Samuel Newson*, the plaintiff's intestate; and that the said ship departed and set sail from the port of *Baltimore*, on the voyage insured, on the —— day of September, in the year 1817, and in the prosecution of that voyage was wholly lost by the perils of the sea. He further gave in evidence, that the defendant applied to the said insurance companies, and received from them the amounts respectively insured by the policies aforesaid, after deducting therefrom the usual charges. And further read in evidence the depositions, returned under the commission issued in this cause to take testimony, and the following *exhibit No.* 1. "Know all men by these presents, that I *Archibald Kane*, of the state of *New-York*, a native born citizen of the *United States*, (but at present in the city of *Port-au-Prince*, island of *Saint Domingo*) for and in consideration of the sum of five thousand dollars to me in hand paid, at and before the sealing and delivery of these presents, by *Samuel Newson*, ship master of the city of *New-York*, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said *Samuel Newson*, his executors, administrators and assigns, the whole of the good ship or vessel called *The La Franchise*, of the burthen of three hundred and sixty tons, or thereabouts, together with all her masts, sails, yards, anchors, cables, ropes, cords, boats, oars and furniture, to the said ship belonging or in anywise appertaining. To have and to hold the said ship or vessel unto him the said *Samuel Newson*, his executors, administrators and assigns forever, as his and their own proper goods, and to and for his and their own proper use and uses forever. And the said *Archibald Kane* doth hereby for himself, his heirs, executors and administrators, covenant, promise, grant and agree, to and with the said *Samuel Newson*, his executors, administrators and assigns, that the said *Archibald*

Kane, at the time of the sealing and delivery of these presents, is the true and lawful owner of the said ship or vessel, and premises, hereby granted, bargained and sold, or mentioned, or intended so to be, unto the said *Samuel Newson*, his executors, administrators and assigns, as aforesaid; and that he the said *Archibald Kane*, at the time of the sealing and delivery hereof, hath in himself full power and good authority in law to grant, bargain and sell, the said ship or vessel, and premises above bargained and sold, or mentioned, or intended so to be, unto the said *Samuel Newson*, his executors, administrators and assigns, in manner aforesaid; and also that it shall and may be lawful to and for the said *Samuel Newson*, his executors, administrators and assigns, from time to time, and at all times hereafter, quietly and peaceably to have, hold, possess and enjoy, the said ship or vessel, and all other the premises hereby granted or mentioned, or intended so to be, without the let, trouble, denial, molestation, hindrance or disturbance, whatsoever, of him the said *Archibald Kane*, his executors, administrators or assigns, or of any other person or persons whatsoever, lawfully claiming, or to claim by, from, or under him, them, or any of them, and that freed and discharged of and from all former and other bargains, sales and incumbrances, made, done or committed, by him the said *Archibald Kane*, or any other person or persons by his order, consent, privity or procurement. In witness whereof I have hereunto set my hand and seal this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixteen.

Archd. Kane, (Seal.)

Sealed and delivered in presence of,

H. Wainwright, *James T. Harding*."

"*James T. Harding*, of the city of *New-York*, deposeth and saith as follows: To the first interrogatory this deponent saith that he knows the parties, plaintiff and defendant. That he knew the plaintiff ten or twelve years since slightly, and that he knew the defendant in the year 1817, since which time he has had but little knowledge of him. To the second interrogatory this deponent saith, that he knew both *Archibald Kane* and *Samuel Newson*; that the said *Samuel Newson* was the step-father of the witness. That he first knew *Archibald*

Kane about twelve years since, and was acquainted with him up to about July 1817, and that he has known *Samuel Newson* since he the witness was a child. That they are both dead. *Kane* died at *Port-au-Prince* in September 1817, and *Newson* died at *Port-au-Prince* in June in the same year. To the third interrogatory this deponent saith, that he knows the handwriting of *Archibald Kane*, has seen him write, and has received letters from him. The witness having looked upon the paper, marked *exhibit No* 1, saith that the signature to the said paper, "*Archd. Kane*," is in the proper handwriting of the said *Archibald Kane*. To the fourth interrogatory this deponent saith, that at the time of the date of the said paper marked exhibit No. 1, the said *Archibald Kane* resided at *Port-au-Prince*, and the said *Samuel Newson* was a ship master, sailing out of the port of *New-York;* that he does not know whether *Newson* was at *Port-au-Prince* at the time the said paper bears date, or not. That *Archibald Kane* had resided at *Port-au-Prince* several years previous to 1817, cannot say how many, and that *Newson* never regularly resided at *Port-au-Prince* but traded backwards and forwards between that place and *New-York*. That both *Archibald Kane* and *Samuel Newson* were, as deponent believes, citizens of the *United States* at the time the said paper bears date; he knows nothing to the contrary; that the said *Archibald Kane* and *Samuel Newson*, or either of them, were not connected with any commercial house in the *United States* to this deponent's knowledge. To the fifth interrogatory this deponent saith, that the signature of *James T. Harding*, to the paper marked exhibit No. 1, is the true signature of the witness; that he is acquainted with the handwriting of *H. Wainwright*, has seen him write, has not corresponded with him, but has received notes and bills from him. To the sixth interrogatory this deponent, having looked upon the said paper marked exhibit No. 1, saith that the signatures to the said paper are in the proper handwriting of him the said witness, and of *H. Wainwright* the other subscribing witness. To the seventh interrogatory the deponent saith, that he is one of the attesting witnesses to the said paper marked No. 1, and did subscribe his name thereto as such, and did see the other subscribing witness sign the same, and that he did see the said *Archibald Kane* sign, seal, and deliver the said paper writing as his act and deed, in the latter end of January, or beginning of February 1817, at the house of the said *Archibald Kane* in *Port-au-Prince*. To the eighth interrogatory this deponent saith, that to the best of his knowledge and belief the said ship, named and described in the said paper marked exhibit No. 1, belonged, in the months of August and September 1817, and up to the time of her loss, to the said *Samuel Newson*, or rather to his representatives. That at the time the said paper bears date, the name of the said ship was *La Franchise;* that the name of the said ship was changed at *New-York* in the latter end of December 1816, to *Mohawk*, by the said *Samuel Newson*, as the witness presumes; all he knows is, that the name *Mohawk* was painted on her stern. Witness does not know the reason of changing her name, the said ship had previously sailed under *Haytien* colours. The witness sailed from *Baltimore* on board the said ship in August 1817, for *Port-au-Prince*, and the said ship was wrecked and totally lost on *Crooked Island* on the tenth day of September in that year. The witness says, that the defendant told him the said ship was insured for the said last mentioned voyage for six thousand dollars; that the said ship cleared out by the name of *Mohawk* on her last voyage. To the ninth interrogatory the deponent saith, that the said ship was cleared out on her last voyage from the *United States* by the defendant. That on the death of the said *Samuel Newson*, who was captain of the said ship, this deponent, being the first officer, took command of the said ship with the assent of the said *Archibald Kane*, for the purpose of making a voyage from *Port-au-Prince* to *Baltimore*, and back. This deponent arrived at *Baltimore* in said ship, as master, and sailed again on her last voyage for *Port-au-Prince*, without any new appointment as such master. The witness shipped the seamen for the said last voyage under the direction of a notary. To the cross interrogatories the witness says, that being sworn on the Holy Evangelists of Almighty God, he is willing, truly and faithfully, to answer the interrogatories put by the defendant To the first cross interrogatory the deponent saith, that the said ship did not make any voyage from *Port-au-Prince* to *New-York* in the year 1817; but the said ship did make a voyage from *Port-au-Prince* to *New-York* in 1816, at which time witness was mate or first officer of said ship, under the said *Samuel Newson* as captain. The witness does not know to whom the said ship belonged at that time. She was sometimes called the President's ship, (meaning *Petion's* ship,) and sometimes Mr. *Kane's* ship; he presumes she was Mr. *Kane's* ship. To the second cross interrogatory the deponent saith, that the said ship was loaded at *Port-au-Prince* in the year 1816, by the said *Archibald Kane*, and consigned to *John Kane* of *New-York*, brother to the said *Archibald Kane;* that no freight was ever paid or demanded on the goods of *A. Kane*, to the knowledge of the witness. To the third cross interrogatory the deponent saith, *Archibald Kane* and *Samuel Newson* were concerned together for several years, and that the said *Samuel Newson* sailed in the employ of the said *Archibald Kane* about a year previous to the year 1817; that he presumes that the said *Samuel Newson* enjoyed the confidence of the said *Archibald Kane* during that time. To the fourth cross interrogatory the deponent saith, that he understood and believed that the said ship belonged to *Archibald Kane* during the time she was called *La Franchise*, but the witness believes she belonged to *Samuel Newson* after she was called the *Mohawk.* The witness considers that *Samuel Newson* was in the employ of *Archibald Kane*, while the said ship was under *Haytien* colours, but cannot say whether *Newson* was in the employ of *Kane* after the name of the said ship was changed to *Mohawk;* he has no belief on the subject. The witness says, that the said ship *La Franchise* did enter, unload and load, in *New-York*, in 1816, and that captain *Newson* did obtain a certificate of *American* ownership of the said vessel, and called her the *Mohawk.* To the fifth cross interrogatory the deponent saith, that he continued in the same capacity, as first officer of the said ship, until her arrival at *Port-au-Prince*, and up to the time of captain *Newson's* death; that the said ship arrived at *Port-au-Prince* on the 18th day of January 1817, and captain *Newson* died on the 5th of June following. Witness says he has heard captain *Newson* say that the *Mohawk* belonged to him, but never heard him say any thing on the subject of the payment of the consideration—he believes captain *Newson* was able to buy such a ship. Witness knows nothing about *A. Kane's* being the rightful owner of said ship, or of her being covered by captain *Newson* for *A. Kane*, and had no means of ascertaining what the general opinion was at *Port-au-Prince*, as he had but little intercourse with the shore. She was generally called *The President's Ship*, both before and after her name was changed to *Mohawk*. The witness never heard captain *Newson*, in speaking of said ship *Mohawk*, speak of her as Mr. *Kane's* ship; but he did hear captain *Newson* say, that if he could settle his affairs with the said *Archibald Kane*, he would return home with the said ship, and that he believed *Archibald Kane* was playing the fool with him, and would not furnish him a cargo. Witness never heard *Archibald Kane* speak of the *Mohawk* as his ship; but after the death of captain *Newson*, the said vessel being then loading for *New-York*, *Kane* said he was acquainted with captain *Newson's* affairs, and changed the destination of the ship to *Baltimore*, where he said he would furnish a cargo for *Port-au-Prince*, and thence send her to *Europe* where she could be sold. The witness says, that *Archibald Kane* instructed him to go on to *New-York* to obtain authority from the administrators of *Samuel Newson* to dispose of the said ship; and that after the arrival of the said ship at *Baltimore*, he the witness did go on to *New-York* for that purpose, but learnt that no administrators had been appointed. Witness says that captain *Newson* did draw the money, to pay the crew of the said ship *Mohawk*, from *Archibald Kane*, and that he the witness also did the same after his appointment to the command of the said ship; as to his appointment to the command of the said ship, the witness refers to what he has already said on that subject in his direct examination. That at the time witness took the command of the said ship, he had no particular conversation with the said *Archibald Kane*, but that *Kane* promised to allow witness sixty dollars per month wages. The witness says that *Kane* loaded the said ship *Mohawk* with logwood and coffee, consigned to *G. Douglass* of *Baltimore*, the freight of which was, as witness believes, stated per bill of lading to have been paid at *Port-au-Prince*. That said *Kane* did not pay, or promise to pay, any freight to witness, but said that when the vessel returned he would close up and settle captain *Newson's* accounts. That he the witness did sign the bills of lading without asking any questions concerning freight; Mr. *Kane* saying the bill of lading was filled up as previously mentioned to satisfy Mr. *Douglass.* The witness says that Mr. *Kane* did not mention to him in confidence any thing relating to his business, or his creditors in *New-York*, or to the situation of his property. That the said *Archibald Kane* did not charge witness to go on to *New-York*, immediately after his arrival at *Baltimore*, for the purpose of preventing his creditors from attaching or molesting the ship or cargo at *Baltimore;* that witness did go from *Baltimore* to *New-York*, but for the purpose previously mentioned. The witness says he has no recollection of a portage bill having been sent to *G. Douglass* by *A.* K*ane*; but he does recollect, that on his arrival at *Baltimore*, he made out a portage bill, in which, as he believes, the wages of captain *Newson* were not inserted, his own wages as mate and captain, and the wages of the crew, were included in the said portage bill. Witness recollects that *A.* K*ane* did say he would give orders to *G. Douglass* to pay the portage bill at *Baltimore*, but does not recollect that he said any thing further on this subject to the witness or the crew. He believes he did ask Mr. *Douglass* for the amount of the portage bill shortly after deponent's arrival at *Baltimore.* The witness has no recollection of having stated to Mr. *Douglass* that *A.* K*ane* had made a mistake in calculating the wages of captain *Newson*, nor has he any recollection of the amount received of Mr. *Douglass* to pay off the crew. Witness says that he had no bargain or agreement with *A.* K*ane* on the subject of cabin stores. That he recollects to have had some altercation with Mr. *Douglass* as to the amount, and recollects to have paid a part of it himself to Mr. *Chappell*, but he has no particular recollection of the amount thus paid by him. Witness says he has no recollection of mentioning to Mr. *Douglass* that Mr. K*ane* had become d—n stingy and close in sailing his vessels. The witness had no understanding with Mr. K*ane* about the privilege of an adventure in the *Mohawk* free of freight, nor does he recollect any conversation with Mr. *Douglass* on that subject. Witness says that after the said vessel was loaded at *Baltimore* by *G. Douglass*, and consigned to *A.* K*ane*, he the witness did sign bills of lading, in which the freight was stated as having been paid at *Baltimore*, the witness considering that all the accounts would be arranged by Mr. K*ane* at *Port-au-Prince;* that neither Mr. *Douglass*, nor any one else, paid the witness the freight, or any part of it; that the witness signed the bills of lading without asking any questions, for the reasons previously given. Witness says, that at the time of witnessing the said paper marked exhibit No. 1, the parties thereto were present; that neither of the parties stated to the witness the purport of that paper, and that he did not at that time, nor at any other time, witness any other paper of the same kind or appearance. The witness does not know that he ever did witness a counter bill of sale of the said ship *La Franchise*, or *Mohawk*, from *Samuel Newson* to *Archibald Kane.* Witness never understood from *Archibald Kane* whether he had or had not made a *bona fide* sale of the said ship *La Franchise*, or *Mohawk*, to *Samuel Newson.*" Whereupon the defendant, in support of the issue on his part, offered in evidence the letters stated in the plaintiff's first exception, written by *Archibald Kane* to the defendant, respectively bearing date the 28th of June and 5th of July 1817, to show, that in making the said policies of insurance he was acting as the agent of the said *Archibald Kane.* And further offered in evidence the depositions returned under the commission in this cause. The defendant then moved the court to instruct the jury, that if they shall be of opinion that the bill of sale offered in evidence by the plaintiff, as proved under the commission aforesaid, was a merely fictitious instrument, without any consideration really paid therefor, that the sale was merely colourable, and intended to cover the interest of *A. Kane* in the *Mohawk*, under the name of *Samuel Newson*, and that notwithstanding such pretended sale the property of the vessel in the understanding, both of *Newson* and K*ane*, remained in the said K*ane* at the time of the insurance effected by the defendant, and at the time of the loss of the vessel, that then the plaintiff is not entitled to recover in this action. And the defendant further moved the court to instruct the jury, that if the jury shall be of opinion, that the bill of sale aforesaid from

A. Kane to *Samuel Newson*, is a genuine instrument, and that the sale of the vessel by *Kane* to *Newson*, was a valid and *bona fide* sale, yet if they shall also be of the opinion that the insurance effected by the defendant with the aforesaid insurance companies, as set forth in the evidence, were effected by the defendant, as the agent and for the benefit of the said *Kane* alone, and that neither the said *Newson*, nor his representatives, nor any interest of their's, real or supposed, was within the contemplation either of the defendant, the agent, or of the said insurance companies, at the time the said insurances were effected, nor was intended by them, or either of them, to be covered by the said policy, that then the plaintiff is not entitled to recover in this action. Both of which instructions the Court [*Archer* Ch. J. and *Ward*, A. J.] refused to give; but were of opinion, and so instructed the jury, that if they should believe that the said bill of sale was executed by the said *Archibald* K*ane*, that then the same was good and legal evidence of title in the said *Samuel Newson*, and his representatives, and that no testimony was admissible to prove that said bill of sale was collusive and fictitious, and intended to defraud the creditors of the said *Archibald* Kane. The defendant excepted. Verdict for the plaintiff, and damages assessed to $2,784 71. Judgment on the verdict for $10,000 current money, the damages laid in the declaration, and costs; to be released on payment of the damages assessed by the jury, with interest, &c.

The plaintiff and defendant both appealed to this court, where both appeals were argued together before BUCHANAN, Ch. J. and EARLE and STEPHEN, J.

Kennedy, for *Newson's* Adm'r. on the appeal by him. He contended, 1. That the court below erred in admitting in evidence the letters from K*ane* to the defendant, in the manner stated in the *first* bill of exceptions, for the purpose of showing, that the policies of insurance were intended for the benefit of K*ane*, and that the defendant acted for K*ane* alone, in effecting them, and not for *Newson*—because the same was contradictory to the terms of the policies, and the bill of sale from K*ane* to *Newson*.

2. That the court below also erred in admitting the certifi-

cate of *James T. Harding*, master of the ship *Mohawk*, in her last voyage, as competent evidence of the amount of disbursements made on account of said ship by the defendant, because *Harding* was alive, and was examined as a witness in the cause, and the said certificate was given by him after the commission which issued to take testimony was closed—and there was no privity between him and the plaintiff.

3. That the court below further erred in allowing such disbursements, so proved, to be deducted by the jury from the amount of money received by the defendant from the insurance offices, on account of the said ship, and to which the plaintiff was entitled, because the defendant, by law, ought not to have been allowed for such disbursements, even if the same had been duly proved.

4. The court below erred in leaving to the jury the question of the plaintiff's right to recover interest, as a question of fact; and ought to have instructed them that the plaintiff was entitled to interest from the commencement of the action.

5. The court below erred in not directing the jury, if they found the execution of the bill of sale, to give a verdict for the plaintiff for the whole amount they should find the defendant received on account of the ship *Mohawk*, together with interest as aforesaid, deducting only the amount of the premium notes of the defendant; and that this court ought now to render the judgment which the court below should have given, it being mere matter of computation from the facts found by the jury, and admitted upon the record; and that there would therefore be no occasion for a *venire de novo*.

1. The insurance of the vessel at the two offices, which is the only question in controversy, must enure to the benefit of *Newson's* representatives; and the letters of *Kane* were inadmissible in evidence while the ownership of the vessel was in *Newson's* representatives. It was not competent for the defendant to deny such ownership. He acted as the agent for *Newson's* representatives; and the insurance was made *for whom it might concern*. No parol evidence was admissible to show that any other person was interested but *Newson's* representatives; and it was only necessary to show that the vessel belonged to *Newson's* representatives. He cited 2 *Phill. Evid.* 45.

Mumford vs. Hallett, 1 *Johns. Rep.* 439. *Graves vs. Boston Marine Insurance Company*, 2 *Cranch*, 419. *Lyman vs. United Insurance Company, &c.* 17 *Johns. Rep.* 337. *Jackson vs. Foster*, 12 *Johns. Rep.* 488. The making the insurance made the defendant an agent for *Newson's* representatives. He had the possession of the vessel, and was the agent of the person to whom she belonged; and the attempt to use in evidence K*ane's* letters, was an attempt to defeat the right owner out of the insurance. *Lucena vs. Crauford*, 3 *Bos. & Pull.* 75, 93. *Routh vs. Thompson*, 13 *East*, 274. *Lanyon vs. Blanchard*, 2 *Campb.* 597. *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 485. *Tenant vs. Elliott*, 1 *Bos. & Pull.* 3.

2. On the *second* and *third* points, he cited *French vs. Backhouse*, 5 *Burr.* 2727. *Wolff vs. Horncastle*, 1 *Bos. & Pull.* 316. *Whitaker's Law of Lien*, 45. *Whittington vs. The Farmers' Bank, &c.* 6 *Harr. & Johns.* 548. *Ross vs. Worsopp*, 1 *Bro. Parl. Ca.* 284. *Somerville vs. Somerville*, 5 *Ves.* 780. *Snook vs. Davidson*, 2 *Campb.* 218. *Pipon vs. Pipon*, 9 *Mod.* 431. *Holmes vs. Reemson*, 4 *Johns. Ch. Rep.* 478. *De Sobry vs. De Laistre*, 2 *Harr. & Johns.* 224.

3. On the *fourth* point, he cited *Liotard vs. Graves*, 3 *Caine's Rep.* 234. *Robinson vs. Bland*, 2 *Burr.* 1085. *Anonymous*, 1 *Johns. Rep.* 315. *Waddington vs. United Insurance Company*, 17 *Johns. Rep.* 23.

R. Johnson, on the same side. On the *first* bill of exceptions he contended, that the letters of *Kane* were not evidence, because he would not have been admitted himself to give evidence of the facts contained in those letters, he having an interest in the event of the suit. 1 *Phill. Evid.* 36, (and *note.*) *Harrison vs. Vallance*, 1 *Bingham*, 45, (8 *Serg. & Lowb.* 239.) *Jackson vs. Eaton*, 20 *Johns. Rep.* 478.

On the *second* bill of exceptions. If the facts in *Harding's* certificate were legally proved, they could not be evidence for the purpose for which the certificate was offered, because the amount of the disbursements were not pleaded by way of set-off, and no notice given of a set-off. 1 *Chitty's Plead.* 474.

Meredith, for *Douglass*. 1. On the *first* bill of exceptions. *Kane's* letters were not offered in evidence for the purpose of proving the property of the vessel to be in him, but to show that the insurance was effected by the defendant for *Kane*, and as his agent. It does not thereby follow that K*ane* sets up ownership in the vessel. Any person who has a special property in a vessel may insure. A charterer of a ship may insure her. *Oliver vs. Green*, 3 *Mass. Rep.* 133. *Bartlett vs. Walter*, 13 *Mass. Rep.* 267. *Hobbs vs. Hannam*, 3 *Campb.* 93. *Phill. on Ins.* 51. But it has been urged that the letters are contradictory to the policy of insurance, and on that ground inadmissible in evidence. The party on whose account the insurance was effected, is not named. The defendant stands in the policy as agent; and you may go out of the policy in order to ascertain who is the assured. *Lawrence vs. Sebor*, 2 *Caine's Rep.* 203. *Davis vs. Boardman*, 12 *Mass. Rep.* 80. *Phill. Ins.* 63. *Church vs. Hubbart*, 2 *Cranch*, 196. 3 *Starkie's Evid.* 1021. *Mechanics Bank of Alexandria vs. Bank of Columbia*, 5 *Wheat.* 326. *Grant vs. Hill*, 4 *Taunt.* 380. The verdict in this case could not be used for or against K*ane*, in any suit by or against him. He was not, therefore, an interested witness. The letters are admissible evidence as a part of the *res gestæ.*

2. On the *second* bill of exceptions. The point involved in this exception, as to the admissibility of *Harding's* certificate in evidence, is abandoned by the defendant's counsel. The question was hastily decided by the court below without argument. The error of the court below is confessed, and the exception is waived.

3. On the *third* bill of exceptions. The court below has not stated that it is a general principle that the jury are to allow interest or not in all cases, but that in this particular case it was a fact for the jury. Here the defendant may be assimilated to a stakeholder; and the question, whether he ought to pay interest, must depend upon his conduct, as to what manner he has used the money, or thrown obstacles in the way of its recovery from him. This should be left to the jury to be ascertained by them. This is an action for money had and received; and the question of interest is for the jury, and depends upon the peculiar circumstances of the case. *Pease vs. Barber*, 3 *Caine's Rep.* 266. *Anonymous*, 1 *Johns. Rep.* 315.

4. On the *fourth* bill of exceptions, he contended, 1. That the evidence offered by the defendant in this exception, was admissible for the purpose for which it was offered. 2. That under the circumstances attending the effecting the insurance, it being designed for the benefit of K*ane*, and made by his authority, by the defendant as his agent, it did not enure to the benefit of the plaintiff's intestate, even though he was the true owner of the vessel; and that he was, therefore, not entitled to the proceeds of insurance in the hands of the defendant.

This bill of exceptions embraces two prayers made by the defendant—1st. Whether the bill of sale, being without consideration and fictitious, the plaintiff was entitled to recover. This prayer is hypothetical. The facts, that the transaction was collusive, are not to be doubted; and being so, no property in the vessel passed to *Newson*. The court refused to give the direction prayed, because the evidence was inadmissible. Was the evidence inadmissible? It was introduced as collateral—between different parties to the instrument. *Bend vs. Susquehanna Bridge & Bank Company*, 6 *Harr. & Johns.* 128. *Overseers of the Poor, &c. vs. Overseers of the Poor, &c.* 10 *Johns. Rep.* 229. 3 *Starkie's Evid.* 1051. The defendant is no party to the bill of sale. He is not a privy; but a mere stakeholder of the fund, and not in privity with either party. The evidence was not to vary the legal operation of the bill of sale, but to defeat its existence, as a fraud upon K*ane's* creditors. It is not to substitute the parol for the written evidence, but to avoid the bill of sale. 3 *Starkie's Evid.* 1015. An instrument of writing intended in fraud of others, may be avoided by such other persons. *Ib.* 1017. 2d. The *second* prayer reverses the hypothesis in the preceding prayer, by admitting the property in the vessel to be in *Newson*, and raises the question, whether, as he was no party to the contract of insurance, and it did not refer to him, but was made for the benefit of *Kane*, the plaintiff, as his representative, was entitled to recover? The court decided, that if the facts were true, the plaintiff was entitled to recover. Suppose this action was by *Newson* against the underwriters; if he could not recover from them, he cannot recover from the defendant. If the insurers paid the money to the defendant by mistake, they could recover it back from him. *Grant* *vs. Hill*, 4 *Taunt.* 380. Could *Newson* recover from the underwriters? Two things must concur to enable him to recover from them—a contract, and an insurable interest. He might have contracted in person, or by his authorised agent. Here there was no contract between *Newson* and the underwriters, either in person or by agent. If by agent, where is the proof that the defendant was his agent? *Newson* was then dead, and he had no representative until after the money had been paid to the defendant. The plaintiff had no legal existence, either when the insurance was effected, or when the money was paid. There was no principal at the time of the insurance, or payment of the money. The proof is, that the contract of insurance was made for *Kane.* Could it, therefore, enure to the benefit of another person for whom it was not intended or made? No person can maintain an action on a contract to which he is not a party. 1 *Esp. Dig.* 202, (105.) *Jordan vs. Jordan, Cro. Eliz.* 369. *Crow vs. Rogers,* 1 *Stra.* 592. There is no difference in the application of this principle to the doctrine of insurance. The clause in the policy of insurance, "for whom it may concern," is capable of being construed to comprehend the insurable interest of *Kane*, to the exclusion of *Newson's.* Here there is proof that the insurance was effected by the defendant as the agent of *Kane*, and there is no proof that he insured for any other person. All actions on policies of insurance must aver an insurable interest in the plaintiff, and that the insurance was made for his benefit, and on his account. *Bell vs. Ansley* 16 *East*, 141, (and *note.*) *Cohen vs. Hannam,* 5 *Taunt.* 101. If the action had been by *Newson* against the underwriters, and the proof in this action was given in evidence, it would not support the averment which he ought to make in his declaration. *Phill. Ins.* 57, 58. *Bodwy vs. Union Insurance Company, Condey's Marsh.* 473, (*note.*) It must appear that the policy was effected for a particular person. He must be a party to the contract, or show that it was made for his benefit. *Lawrence vs. Sebor,* 2 *Caine's Rep.* 203. *Phill. Ins.* 60. A person having an insurable interest, if it is different from that insured, cannot recover on the policy. *Toppan vs. Massey,* 2 *Mass. Rep.* 365. *Conway vs. Gray,* 10 *East,* 536. *Phill. Ins.* 63. An insurance cannot enure for the benefit of another for whose benefit it was not made. It has not been shown that the defendant insured for the benefit of *Newson*, or his representative. The representative of *Newson* being excluded by the proof in this bill of exceptions from having an insurable interest, he cannot recover. *Routh vs. Thompson*, 11 *East*, 428. *Routh vs. Thompson*, 13 *East*, 274. Where an insurance is effected by an agent, it must enure for the benefit of the person who constituted him the agent. *Seamans vs. Loring*, 1 *Mason's Rep.* 128. It has been said that the plaintiff has adopted the insurance, as made by the defendant, as his agent. The adoption, if it could be made, comes too late. It is after the money has been paid to the defendant. Here there could be no adoption, because the insurance was not intended for his benefit, or on his account.

R. Johnson, for *Newson's* Adm'r. in reply, as to the *first*, *second* and *third* bills of exceptions, and in answer to the *fourth* bill of exceptions.

1. On the *first* bill of exceptions. If the letters of *Kane* were out of the case, the plaintiff would have been entitled to recover to the extent of his demand. He proved an insurable interest, and that the defendant insured for the benefit of those concerned. The irresistible conclusion would be, therefore, that he acted as the agent of the plaintiff. But the letters are intended to prove that the defendant acted as the agent of *Kane*, and for his benefit; and not that *Kane* did not look to the interest of *Newson's* representative, and act as his agent. The letters were inadmissible. 1. *Kane* is to be assumed to act as agent of *Newson.* 2. Whether he did or not, but as a wrong-doer, the plaintiff has a right to adopt his acts. There was no evidence to show that *Kane* had an insurable interest, unless as agent of *Newson*. *Kane* was not the owner of the vessel; the ownership was proved to be in *Newson*. The insurance must be presumed to have been made for the benefit of the person having the insurable interest in the thing insured. What right had *Kane* to insure the property of another, unless as agent? If he did not insure as agent, then he acted as a tort feasor. If the insurance had been in the name of *Kane*, for the benefit of those whom it might concern, then the plain-

tiff, having the interest in the thing insured, could recover. If the money was paid over to K*ane*, then it would be money in his hands for the benefit of *Newson's* representative. If a man takes the property of another, and sells it, the true owner may waive the tort, and bring an action for the value received. Here K*ane* took the vessel of the plaintiff, and sends her on a voyage. She is lost, and K*ane* received the value of the property. The plaintiff may elect to go for the value received, instead of suing K*ane* as a tort feasor. If an agent represents himself as owner of the thing insured, the policy will enure to the benefit of the true owner. *Lanyon vs. Blanchard*, 2 *Campb.* 597. Here K*ane*, being the agent of *Newson*, employed the defendant to effect the insurance for him. The defendant, knowing nothing of the true owner, effects the insurance in his own name, and for all whom it might concern, the insurance will enure to the benefit of the true owner. This is presisely the case of *Lanyon vs. Blanchard*, 2 *Campb.* 597. It is immaterial whether the true owner authorised, or knew of the insurance, he may adopt it at any time. If the vessel arrived safe, he might disavow the act; and if she was lost, he could claim the insurance. *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 485. The defendant cannot set up the invalidity of the policy to prevent his paying the money over to the true owner. *Tenant vs. Elliott*, 1 *Bos. & Pull.* 3. The letters of K*ane* were not offered to show, that the insurance was a valid one. If the policy was illegal, the party receiving the money under it cannot avoid the policy. The letters were offered to prove, that the fund belonged to K*ane*, and not to the plaintiff. K*ane* was not a competent witness, nor are his letters competent testimony for the defendant. If the defendant succeeds in this action, he cannot retain the money, but will be obliged to pay it over to K*ane*. His letters then go to establish his interest in the fund. He is substantially the defendant. *Harrison vs. Vallance*, 8 *Serg. & Lowb.* 239. Whether the verdict could or could not be used in evidence for or against K*ane*, yet the effect of a verdict for the defendant would be to place the fund into the hands of K*ane*. If the suit was by K*ane* against the underwriters, his letters would be evidence as a part of the *res gestæ*. The effect of his letters go to show that the fund does not belong to the plaintiff, but to him.

2. On the *second* bill of exceptions. Although this exception has been abandoned in this court by the defendant, the plaintiff has a right to the opinion of this court on it. The defendant may abandon the exception by refusing to urge any thing in support of the opinion given by the court below, and confess that that court erred in relation to it; yet as it is the plaintiff's exception, he is entitled to the opinion of this court upon it. The question, whether or not the certificate of *Harding* was evidence, has been answered by the defendant's counsel, who admits that it was not legal evidence. If it had been admissible, could the facts contained in it be used to prove the amount of disbursements made by the defendant before the receipt of the money on the insurance, and that he had paid them? On the state of the pleadings, the facts could not be used, for that purpose, as a set-off to the plaintiff's claim. By offering the set-off, the defendant admits, under the issue joined, that he made the *assumpsit* charged in the declaration, To use it as a discount or set-off, the defendant must have pleaded it, or have given notice to the plaintiff of its being relied on at the trial.

3. On the *third* bill of exceptions. The question of interest is a question of law for the court, and not one of fact for the jury. *Pease vs. Barber*, 3 *Caine's Rep.* 266. *Liotard vs. Graves*, *Ib.* 234. *Waddington vs. United Insurance Company*, 17 *Johns. Rep.* 23. *Anonymous*, 1 *Johns. Rep.* 315.

4. On the *fourth* bill of exceptions. The bill of sale of the vessel from Kane to *Newson* has been proved by the subscribing witness. It was executed before the insurance was effected. By the *first* prayer the court was called upon to direct the jury that this bill of sale was fictitious, without any evidence to show that it was so, except K*ane's* letters. It was an abstract question, which the court were not bound to decide. But the proof is, that the bill of sale was a *bona fide* transaction. This evidence came out on the cross examination of a witness by the defendant as to *Newson's* declarations. As there was no evidence to impeach the bill of sale, the direction prayed was properly refused. *Coale vs. Harrington, (ante* 147.*)*

If there had been no evidence stated in the bill of exceptions, then this court might presume that such evidence was offered so as to justify the prayer. *Barnes vs. Blackiston*, 2 *Harr. & Johns.* 376. The bill of sale was to be rendered void, if fraudulent, only at the instance of a creditor.

As to the *second* prayer—the proof is, that when *Kane* directed the insurance, he acted with a view to the benefit of *Newson's* representative. He took possession of the vessel, the owner being dead. He became thereby executor *de son tort*, and as such he sent the vessel to *Baltimore*, and caused her to be insured. He had an insurable interest; and the presumption is, that he had the insurance effected for the benefit of *Newson's* representative. *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 485. There is an inconsistency in the opinions of the court below, as given in the *first* and in the *fourth* bills of exceptions. In the first the letters of *Kane* are admitted in evidence, and in the latter the court say the letters prove nothing.

Mitchell, on the same side. On the *second* bill of exceptions, as to the allowance for disbursements, he referred to *Snook vs. Davidson*, 2 *Campb.* 218. 2 *Liv. on Agency*, 80, 83, 103. *Munford vs. Nicoll*, 20 *Johns. Rep.* 613. *Phill. Ins.* 520.

On the *fourth* bill of exceptions What is the plaintiff's right to recover founded on? It is upon the receipt of the money by the defendant, as his agent, under the policies of insurance. The right of the plaintiff does not rest alone on the bill of sale, but on the actual possession of the vessel as owner. There is a consideration expressed in the bill of sale which *Kane* acknowledged to be a valid one, and which he cannot now contradict. It is evidence of a *bona fide* consideration. There are also the declarations of *Newson*, as made evidence by the defendant, that he was the owner, and the recognition by *Kane* of that ownership. The *first* prayer, as stated in this bill of exceptions, is founded on the evidence contained in the depositions returned under the commission; and *Kane's* letters are no part of the evidence upon which the prayer was founded. *Riggin vs. Patapsco Insurance Company*, (*ante* 279.) But the letters do not impeach the bill of sale; and if they do, it is not competent for a party, who has executed an instrument of writing, to come into court, and contest its validity. He is estopped from denying the title which passed under it. If the bill of sale was voluntary, it would make no difference as to Kane, unless he could show it was obtained by fraud or imposition; and there is no such proof here. No person, but he who is defrauded, can take advantage of it. *Jackson vs. Eaton*, 20 *Johns. Rep.* 478. There is no privity between the defendant and Kane, so as to justify the former in setting up a fraud by *Newson* on Kane He was no creditor of Kane. But if he can, are Kane's letters evidence to prove the fraud? They are but the declarations of Kane, and Kane himself would not be a competent witness. Nor can Kane's death affect the case. If they were his dying declarations they would not be evidence, even if he were a competent witness. *Wilson vs. Boerm*, 15 *Johns. Rep.* 290. The declarations of a party in his own favour are never admitted in evidence. The letters, therefore, are incompetent to impeach the bill of sale. 2 *Phill. Evid.* 62, 219. *Roseboom vs. Billington*, 17 *Johns. Rep.* 187. *Fairlie vs. Hastings*, 10 *Ves.* 123. Whether or not the defendant was the agent of Kane, the court did not take into consideration. They said that no evidence was admissible to prove that the bill of sale was collusive, and intended to defraud Kane's creditors. What was it to the defendant whether the bill of sale was fraudulent or not? He was not a creditor, and none but creditors could prove the fraud, and take advantage of it. In the *second* prayer the defendant relies upon his own order for insurance, and that the insurances were effected in pursuance of that order. If the suit had been by Kane against the insurers, the defendant would have been a competent witness for Kane, and he might or might not use Kane's letters to show his agency. The defendant, instead of naming his principal in the policies, describes him; this is as sufficient as if he had named him. But when the person described, the owner of the vessel, comes forward, he is denied by the agent. Who was the person for whom the defendant made the insurance? It was the owner of the vessel; and who is the owner? Not Kane, but *Newson*. What is the legal import of the words used in the policies, "*for whom it may concern?*" It imports the person having an interest in the thing insured. They have a technical meaning. But the evidence offered denied the policies, and denied the name of the owner of the thing insured. It denies that the owner was *Newson*, but that it was K*ane*. The defendant, by the evidence, denies his principal, who was the true owner, and that true owner was N*ewson*. The defendant may say that he was mistaken as to who was his principal; but he cannot shield himself under such a defence. Let him go into equity to reform the contract. At law it is binding upon him. What he intended to do, and what he did do, are different. He may have intended to insure for K*ane*, but he insured for the owner, and N*ewson* was the owner. "For whom it may concern," means the person who has an interest in the thing insured. *Seamans vs. Loring*, 1 *Mason's Rep.* 128. *Lyman vs. United Insurance Company*, 17 *Johns. Rep.* 377. S. C. 2 *Johns. Ch. Rep.* 630. If the insurance was effected for K*ane*, it was a void policy; for he could not bring himself within the terms "for whom it may concern." He had no insurable interest. It would be a wagering policy, if it was not effected for the benefit of *Newson*, and would be void *per se*. If *Newson's* representative had no interest, then the plaintiff has no claim to the money. As to wagering policies, he referred to *Goram vs. Sweeting*, 2 *Saund.* 201, (and *notes.) Wolff vs. Horncastle*, 1 *Bos. & Pull.* 320. A contract of insurance, is a contract of indemnity. 1 *Phill. Ins.* 4, 26, 29. There is no evidence that *Kane* had an insurable interest; and if he had none, he could not insure on a valid policy. It would be a wagering policy, and therefore void. To give effect to the policies of insurance in this case, they must be construed as effected for the benefit of *Newson*. *Cousins vs. Nantes*, 3 *Taunt.* 521. They will protect the interest of *Newson* if there was no mistake; and there was no mistake, for the underwriters insured for the benefit of the true owner. If the defendant intended to insure for the benefit of *Kane*, that fact cannot be proved by parol evidence—the policies being for the benefit of those whom it might concern—the true owner. To reform the contract for mistake, it must appear to be the mistake of both parties; and here there is no evidence that the underwriters were mistaken as for whose benefit the insurances were made. They have not complained, but have acted under their contracts; and have admitted that the policies covered an insurable interest, by paying the money on the loss of the vessel, to the defendant, as the agent of the person interested. Parol evidence is not admissible to prove a mistake. *Lyman vs. United Ins. Company*, 17 *Johns. Rep.* 377. S. C. 2 *Johns. Ch. Rep.* 630. *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.* 585. *Graves vs. Boston Marine Insurance Company*, 2 *Cranch*, 419. *Phill. Ins.* 5, *(note.)* The defendant knew, from *Kane's* letters, that *Newson* was the owner of the vessel; and when he applied for insurance he did not state on whose account he wanted the insurance. *Kane* did not direct in whose name the vessel should be insured; and the insurers never saw *Kane's* letters. Who is to say that the letters of *Kane* were written at the time they purport to bear date? Where are the defendant's answers to those letters? The letters cannot be evidence that the insurances were effected by the defendant as the agent of *Kane*. 1 *Phill. Evid.* 426, 427. The defendant cannot prove his agency by letters. Where an agent sues, he is the contracting party on the instrument. He must aver the interest, and it must be proved. It is not necessary that an agent should know his principal, in order to act for him. It is for the principal to sanction the acts of his agent. *Routh vs. Thompson*, 13 *East*, 277, 282, 285. *Phill. Ins.* 519. Here the plaintiff has adopted the agency of the defendant, and in due and legal time. The acts of an agent may be ratified, as in this case, after he has received the money under an insurance effected for the benefit of his principal *Lanyon vs. Blanchard*, 2 *Campb.* 597. *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 490. *Stienback vs. Rhinelander*, 3 *Johns. Cas.* 269, per *Kent*, Ch. J. *Phill. Ins.* 59, 519, 520. *Snook vs. Davidson*, 2 *Campb.* 218.

Wirt, *(*Attorney General of *U. S.)* for *Douglass*, in reply, on the *fourth* bill of exceptions. 1. The objection is, that the defendant had no right to make the *first* prayer—there being no evidence, leading to the belief that the bill of sale was collusive, and that the court cannot be called on to give an opinion on an abstract question. If there was any proof going to show that the bill of sale was collusive, whether it was conclusive or not, the defendant had a right to call on the court for its opinion. There was evidence bearing on the point, on which the defendant relied in obtaining the opinion of the court, that the bill of sale was collusive. This evidence is the letters of *Kane*—the order for insurance—the policies of insurance—the proof of loss—the deposition of *Harding*, and the bill of lading and bill of sale referred to in *Harding's* deposition. All this evidence appears in the *fourth* bill of exceptions, upon which the prayer was founded. He then went into an examination of the testimony taken under the commission, and commented upon it. He insisted that the proof went to show that the vessel was not an *American* vessel. 2 *Vol. Laws of U. S.* 113. *Kane's* letters were offered to show that the defendant acted as his agent. They show in what light *Kane* presented himself as principal and owner of the vessel—that he assumed the character of owner, and as such constituted the defendant his agent to effect the insurance. There was sufficient evidence to justify the prayer being submitted to the court; and such a prayer may be offered for the court's opinion, without any evidence being stated. *Barnes vs. Blackiston*, 2 *Harr. & Johns.* 376. If the bill of sale was in fraud of the public laws, then any person may take advantage of it; and here was a fraud attempted on the public, and to evade the laws of the *United States*. It was an attempt to obtain a registry of the vessel as *American*, contrary to the laws of the *United States*. In showing the bill of sale to be fraudulent, there is a distinction between a plaintiff and defendant. The defendant here is not on the same footing as *Kane* would be were he the defendant. How stands the defendant in this action? He is said to be a stakeholder. In September 1817 *Kane* died, and the loss did not occur until December 1817. The whole money was received by the defendant in March 1818. Did he receive the money as agent of *Kane?* A dead man can have no agent. Whose agent was he when he received the money? An administrator is the representative of the creditors of the deceased; so that when the money was received it belonged to *Kane's* creditors. It would be competent for *Kane's* creditors to show in equity that the bill of sale was made to defraud them; and if they could, *Kane's* administrator, in like manner could, on behalf of the creditors. The defendant then held the fund as belonging to the administrator of *Kane*, representing the creditors. He could make the same defence, and contest the bill of sale on the same evidence, which *Kane's* administrator could. The defendant is then for this purpose to be connected with *Kane's* administrator and creditors, and not with *Kane* himself. The assignees of a bankrupt may avoid a fraudulent deed of the bankrupt. But it has been said that there is no proof that there were any creditors of *Kane*. The instruction of the court to the jury assumes that there were creditors; and that the defendant, in right of the creditors, could not give the proof in evidence. The bill of sale, besides, is not according to the directions of the act of congress, which points out how a transfer of an *American* vessel shall be made. 2 *Vol. L. U. S.* 113. and 4 *Vol. L. U. S.* 261.

2. As to the *second* prayer, as stated in this bill of exceptions. Admit that the defendant insured for whom it might concern, and that *Kane* had no interest. If he could not recover, neither could *Newson*. In such a policy by an agent, no person can recover, but by showing—1. That he has an interest; and 2. That the policy was made for his benefit. To prove a policy was made for his benefit he must do so *aliunde* the instrument. "For whom it may concern," are technical words, and mean the true owner concerned in the contract. It does not necessarily follow, that by proving an interest in the thing insured, that the policy was intended for him. He who claims must prove an interest, and also that the contract was intended for him, and that he has adopted it. *Seamans vs. Loring*, 1 *Mason's Rep.* 128, 136. 1 *Condy's Marsh.* 473, (note.) *Phill. Ins.* 57, 59, 60. *Stienback vs. Rhinelander*, 3 *Johns. Cas.* 269. *Lawrence vs. Sebor*, 2 *Caine's Rep.* 203. *Toppan vs. Atkinson*, 2 *Mass. Rep.* 365, 369. In his declaration he must aver that the insurance was effected for his benefit, and on his account. *Bell vs. Ansley*, 16 *East*, 141. *Cohen vs. Hannam*, 5 *Taunt.* 101. *Grant vs. Hill*, 4 *Taunt.* 380. Here the plaintiff must prove he had an interest in the vessel insured; that he authorised the defendant to act for him as his agent in effecting the insurance; that the defendant intended to act, and

did act for him as his agent; that the contract was intended for his benefit, and on his account, and that he adopted it in due and reasonable time. In fact, he must prove in this action what he would be bound to prove if he had brought an action against the underwriters. The doctrine of adoption and ratification go upon the ground that the contract was intended for the party, and that he adopted it; but he cannot adopt what was not intended for him, or his benefit. *Phill. Ins.* 61, 519. Here the defendant did not intend to act for *Newson*. 2 *Park*, 409, 410, 411. But it has been urged, that although the insurance was not intended for *Newson*, yet being made "for whom it may concern," he may come in and claim. This is not the law; he cannot come in unless the defendant *intended* to insure for him. *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 485. *Wolff vs. Horncastle*, 1 *Bos. & Pull.* 316. *Lucena vs. Crauford*, 3 *Bos. & Pull.* 75. *Routh vs. Thompson*, 13 *East*, 274, 284.

As to the right of adoption. Within what time must it be exercised? It need not be before the loss; it may be afterwards. But it cannot be after the insurance has been paid. *Phill. Ins.* 61. The act must be adopted while the transaction is *in fieri*, and not after the question has been settled. The party adopting must come in and encounter some of the expense; and cannot lie by, and appear after the question has been decided. The question tried is, whether it is his contract or not. The question of adoption did not arise in *Lanyon vs. Blanchard*, 2 *Campb*, 597; the question there was a question of lien. How can a man ratify an act done by another for the benefit of a third person? It requires the concurrence of two minds.

Here the policies are for the benefit of an unnamed person. It is a latent ambiguity, and may be explained by parol evidence; and *Kane's* letters are evidence for that purpose. 3 *Starkie's Evid.* 1002, 1021, 1023, 1024. *Mechanics Bank of Alexandria vs. Bank of Columbia*, 5 *Wheat.* 336. The plaintiff forces the inquiry, how the money came into the hands of the defendant? He must look to the policies of insurance, and to *Kane's* letters. They would be evidence against the underwriters, and they are evidence in this action. Put the letters out of the case, and what is the plaintiff's right to recover? He has no colour of title. Suppose he had sued the insurers, he must have proved the policies were made for his benefit. As to the prayers made by the defendant in the court below, this court are referred to *Routh vs. Thompson*, 11 *East*, 428. But it has been said that *Kane* took the vessel as a wrong-doer—suppose he did, the plaintiff has no right to call upon the defendant to answer for the acts of *Kane*. He cannot give up the tort, and go for the money in the hands of the defendant. This action being for money had and received cannot be sustained against the defendant. He did not receive the money which had belonged to *Newson*. It must have been *Newson's* money before the defendant received it, to enable the plaintiff to recover. When the defendant received the money, *Newson* was dead. In *Tenant vs. Elliott*, 1 *Bos. & Pull.* 3, the insurance was effected by the plaintiff in the action; and it was his contract. It is not, therefore, a parallel case with the present. See also *Grant vs. Hill*, 4 *Taunt.* 380.

BUCHANAN, Ch. J. delivered the opinion of the Court. These are cross appeals from the judgment of the *Baltimore* county court in a suit originally instituted by *Roswell L. Colt*, administrator of *Samuel Newson*, against *George Douglass*, to recover the amount received by him on account of certain insurances effected on the ship *Mohawk*, and are presented to this court on *four* bills of exceptions taken at the trial; the *three first* on the part of the plaintiff below, and the *fourth* on the part of the defendant.

The two appeals having been discussed together before this court, they will be considered as if they were consolidated and formed but one case, and the parties treated as plaintiff and defendant. And the admissibility in evidence of the letters from *Archibald Kane* to *Douglass*, which are introduced into the *fourth* bill of exceptions, constituting also the subject of the *first* exception, the *first* and the *fourth* exceptions will be examined in connexion.

The admissibility of these letters is resisted for different reasons; *first*, on the ground that *Kane*, if living, could not have been received as a witness to sustain the issue on the part of the defendant, by proving that the property in the ship was his, and that he directed the insurance for his own benefit; and that his declarations, whether oral or in writing, are not competent for the purpose of establishing what he himself could not have been permitted to prove. The answer to which is, that however true, as a general position, it is not applicable to this case.

The letters of *Kane* were not offered or admitted in evidence as his mere declarations, or with a view of proving property in him at the time the insurances were effected, but for the purpose only, as is stated in the bill of exceptions, of showing by what authority *Douglass*, the defendant, procured the insurances to be made, and that he acted as the agent of *Kane* in these transactions, without affecting any question of property or right in *Kane* to the vessel insured; and it is very clear, that that which is not evidence for one purpose, may be for another, and when offered to prove that for which it is competent, must for that purpose be received.

Kane might, without any insurable interest in the vessel, have caused her to be insured, and have constituted the defendant his agent for that purpose; which fact of agency, unconnected with the question of property or insurable interest, the defendant was competent to prove by the best evidence the nature of the case would admit of; and that best evidence was the correspondence authorising and directing the insurance.

The agency of the defendant was a fact connected with the matter in controversy, but in no otherwise affecting the plaintiff than as the existence of that fact affected the nature of the transaction which gave birth to the suit, and not as concluding the rights of the plaintiff, or establishing the interest of *Kane.*

It is not understood as being denied, that the defendant might have been permitted to prove, that in effecting the insurances he acted as the agent of *Kane;* and how else should that agency have been proved than by the production of the letters themselves by which it was created?

If they were not letters authorising and directing insurance to be effected, but merely reciting or speaking of a pre-existing agency, and depending for their effect on the credit of *Kane*, the objection would have assumed a different character; but as it is, the first ground of objection cannot be sustained. And looking to the cases of insurance, reported in the books, it will be found to be the common, the every day practice, to admit such testimony for the purpose for which it was offered and received in this case. And besides, that it is not opposed to any settled rule of evidence, the very nature of such transactions requires it; it is essential to the great operations of commerce between the different and remote sections of the world, which are, and must to a great extent, be carried on through an epistolary medium.

But it is supposed that the general terms of the policies of insurance of "*George Douglass*, for account of whom it may concern," &c. mean any and every body having an interest in the thing insured; and with that understanding of the policies, it is further contended, that these letters, (showing that the insurances were procured under authority derived from *Kane*,) were inadmissible, as tending to contradict the policies, which on the face of them, are for the benefit of all who may have any interest in the ship, by showing that they were effected for the benefit of *Kane* alone. If that were admitted to be the true meaning of the terms of the policy, it would by no means follow that the objection to the admissibility of the letters, arising merely out of that construction, could be sustained.

They were not used for the purpose of proving any interest or property in *Kane;* but if they had been, and were free from other objections, what was there to exclude evidence of property in him, and that he was the only person concerned in interest in the insurances? The policies being "for account of whom it might concern," evidence of who was in fact concerned, could not surely be contradictory to the policies. On what principle does the plaintiff seek to recover from the defendant the amount insured, other than that the ship belonged to *Samuel Newson*, his intestate, at the time of his death, and that the insurances were for the sole benefit of his representatives? And if evidence, that the insurances were obtained for the benefit of *Kane*, was inadmissible, as being contradictory to the terms of the policies, on what ground could proof be received that they were effected for the benefit of *Newson's* representatives?

But "whom it may concern" is a technical phrase, common to policies of insurance, and is understood to mean, not any and every body who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency, and proceeding upon that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction; and he, for whose benefit the insurance is procured, is the person in the contemplation of the contract—is he, whom it alone concerns.

The inquiry, therefore, in such cases, always is for whose benefit, on whose account, was the insurance obtained, and that not appearing upon the face of the instrument, is a proper subject of extrinsic evidence, which comes in aid of the policy, by pointing out the person to whom it is applicable, the party who is in fact concerned. And this is not confined to policies of insurance; but in the application of every instrument of writing, evidence *aliunde* is necessarily used to designate the proper subject matter to which it relates. The letters of *Kane*, therefore, were properly admitted in evidence, for the purpose of showing that the defendant effected the insurances as his agent, and under authority derived from him; which disposes of the *first* exception, leaving the question of *property* in the ship, and the intention of *Kane*, at the time of directing her to be insured, to the effect and operation of the other evidence in the cause.

It is well settled, that where a policy has not the general clause contained in this, or one of similar import, none can avail themselves of it but those who are named as the parties insured, or on whose account it is expressed to be made.

But it is equally clear, that a policy in the name of one, with the general clause "for whom it may concern," will cover and protect the interest of any person for whose benefit it was intended, and who authorised it to be effected. And if in the absence of any express order or authority from the owner, or any previous communication with him upon the subject, such policy is effected in his behalf; the intention at the time of the party effecting it to cover his particular interest, will so connect him with the policy as that his adoption of it afterwards will cause it to enure to his benefit. The subsequent adoption of a policy by a party interested, and for whose benefit it was intended, being deemed equivalent to his prior order for insurance. On this principle the cases of *Routh vs. Thomson*, 13 *East*, 274, and *Hagedorn vs. Oliverson*, 2 *Maule & Selw.* 485, were decided.

If then, *Newson* at the time of his death was the owner of the ship *Mohawk*, and *Kane*, when he gave the order for insurance to the defendant, did it with reference to the interest of *Newson's* representatives, and intended the insurance for their benefit, the policies, on being adopted by the plaintiff, would enure to his benefit, and *Kane*, if he had received the amount insured, would have been answerable over to him; and so with the present defendant into whose hands it has come. Or, if the money had not been paid by the underwriters, actions might have been maintained against them on the policies for the present plaintiff, on proper averments in the declaration of his interest, &c. And the circumstance that the policies were effected by the defendant, under the authority of *Kane*, makes no difference; acting as his sub-agent, they enure in the same manner that they would have done if they had been effected by *Kane* himself.

The *second* prayer, therefore, in the *fourth* exception, was properly rejected, the plaintiff's right to recover being assumed by the terms of that prayer to depend, not on the intention of *Kane* at the time of giving the order for insurance, but to rest entirely upon the understanding and intention of the defendant. And if it had been granted, the jury must have given a verdict for the defendant, on being satisfied that he effected the insurances as the agent, and for the benefit of *Kane*, even though they should have believed, from the evidence in the cause, that *Kane* himself had in contemplation the interest of *Newson's* representatives, and intended the insurance for their benefit.

But if *Kane* did not give the order for insurance with reference to the interest of *Newson's* representatives, but intended it for his own benefit, and not theirs, then the plaintiff is not entitled to recover. For no one can, by subsequent adoption, avail himself of such a policy, who was not at the time in the contemplation of the party procuring the insurance, and for whose benefit it was not intended, notwithstanding any interest he may have had in the thing insured. The policy not being effected with reference to his interest, his interest was not insured, and he of course not concerned in the transaction.

In the opinion of this court there is nothing in the *first* prayer contained in the *fourth* bill of exceptions.

If the bill of sale from *Kane* to *Newson*, under which the plaintiff claims, was in fact fictitious, and intended to defraud the creditors of *Kane*, it does not lie in the mouth of the defendant, standing in the place of *Kane's* representatives, to set up that fraud in bar of the plaintiff's recovery, however unclean the hands of *Newson* may have been.

As to the *second* exception, it is conceded by the counsel for the defendant, that there was error in permitting the certificate of *Harding* to be read to the jury. It is not to be distinguished from any other mere declaration, in writing, of a third person, of the existence of a particular fact, which from its character can only be proved by the testimony of the witness himself on oath; and was clearly inadmissible, and most probably was admitted by inadvertence.

The question of interest, arising on the *third* exception, is one of frequent occurrence in the books, and has been found to be a subject not susceptible of the application of any fixed and general rule of law, the dealings between man and man being so various in their nature, that scarcely two cases are to be met with presenting the same aspect, but each depending upon its own peculiar circumstances.

There are indeed cases, not to speak of bonds, &c. in which interest is recoverable as of right. Such as on a contract in writing to pay money on a day certain; as in the case of a bill of exchange or a promissory note, or on a contract for the payment of interest, or where the money claimed has actually been used. But with such exceptions, it has long been the settled practice of the courts of this state, to refer the question of interest entirely to the jury, who may allow it or not in the shape of damages, according to the equity and justice appearing between the parties, on a consideration of all the circumstances of the particular case as disclosed at the trial.

The court below, therefore, did right in refusing to give the direction prayed, and in submitting the question of interest to the jury.

But because the certificate of *Harding* was suffered to be read in evidence to the jury, as stated in the *second* bill of exceptions, the judgment of that court must be reversed

Before judgment was entered in either case, the appellant's attorney dismissed the appeal made by *Colt*.

COLT'S APPEAL DISMISSED.

On the appeal by *Douglass*.

JUDGMENT AFFIRMED.

CARROLL, Bail of BRADFORD, *vs.* BARBER.—June, 1826.

A rule of an inferior court authorising a principal to be surrendered in discharge of his bail upon a *scire facias* being returned *scire feci*, at any time during the first five days of the term to which the return is made, is a legitimate rule, and is, in giving time to surrender the principal, a mere matter of favour or indulgence to the bail.

Where the offer to surrender is, in such a case, on the sixth day after the return, it is too late, and the refusal of the court to extend the time to that period, is not a ground of error; and is but an interlocutory proceeding, upon which an appeal will not lie.

Courts will sometimes enlarge or suspend their rules when the ends of justice requre it.

APPEAL from *Anne-Arundel* County Court. This was a writ of *scire facias* upon a recognizance of bail, issued on the 10th of December 1824, reciting that at April term 1823, the appellant became special bail for one *Bradford*, in an action on the case, then depending against him, brought by the appellee, and that in the said action a judgment was rendered at April term 1824. At the return day of the writ of *scire facias*, viz. on the third Monday of April, being the 18th day of that month, in the year 1825, the sheriff of the county made return of the writ, that he had made the same known to the special bail. And on Saturday the *sixth* day of the term, and the 23d of the same month, the special bail brought into the said court the said *Bradford*, who offered to surrender himself in discharge of his bail; and the bail prayed the court to extend the rule of the court for that purpose, to the said day, that *Bradford* might be permitted to surrender himself in discharge of his said bail. This rule was set out in the record as adopted at April term 1806, and is in these words: "The principal may be surrendered in discharge of his bail upon a *scire facias* returned *scire feci,* at any time during the first *five* days of the term, to which the *scire facias* is returned, on payment of the costs of the *scire facias,* but not afterwards; and upon a *Nihil* returned upon two successive *scire facias'* the principal may be surrendered in discharge of his bail at any time during the sitting of the court, upon payment of the costs of the *scire facias,* but not to extend to any adjourned court." The plaintiff objected to the extension of the rule; and the court refused to extend it as prayed by the bail. From this refusal the bail appealed to this court.

The case was argued before BUCHANAN, Ch. J. and EARLE, and ARCHER, J.

Brewer, Jr. for the Appellant, contended that the court below was bound to dispense with the rule of the court, and permit the surrender of the principal in discharge of his bail, as a practice to extend in such cases tending more to the advancement of justice, than did a rigid adherence to the rule.

S. Pinkney, for the Appellee, cited *Hunt vs Coxe,* 3 *Burr.* 1350. S. C. 1 *W. Blk.* 393. *Clarke vs. Bradshaw,* 1 *East,* 86. *Simmonds vs. Middleton,* 1 *Wils.* 270. *Alyson vs. Byston, Cro. Eliz.* 738. *Wynn vs. Petty,* 4 *East,* 102. *Grant vs. Fagan, Ib.* 189. *Cock vs. Bell,* 13 *East,* 355. *Glendinning vs. Robinson,* 1 *Taunt.* 320; and *Maude vs. Jowett,* 3 *East,* 145.

Shaw, on the same side. There is nothing before this court for them to decide. They are called upon to say that the bail shall not be fixed, although he has failed to bring in the principal, and has shown no valid reason why he did not. The rule, as set out in the record, was the law of the court, and could not be relaxed except upon special circumstances. Here there was no circumstance shown to induce the court to grant the prayer of the bail to extend the time of the rule.

Brewer, jr. in reply. The rules of the court are supposed to be founded in justice, and may be relaxed to a certain extent, at least without cause being shown. Here, the day after that fixed by the rule, the principal is brought into court, and offers to surrender himself in discharge of his bail. By relaxing the rule no injustice would have been done to the plaintiff. He had then the body of the defendant, which he could not get under the *ca. sa.* which had been issued for that purpose.

Buchanan, Ch. J. delivered the opinion of the Court. It appears by a rule of the *Anne-Arundel* county court, that a principal may be surrendered in discharge of his bail, upon a *scire facias* being returned *scire feci*, at any time during the first five days of the term, to which the *scire facias* is returned, on payment of the costs of the *scire facias*, but not afterwards.

In this case the offer to surrender the principal by the bail, was on the sixth day of the term, and the appeal to this court is on the ground, that the court below refused to extend the rule, for the purpose of enabling the bail to surrender his principal, after the expiration of the first five days of the term.

The rule of that court is a perfectly legitimate rule, and the giving time to the bail, during the first five days of the term, to bring in and surrender the principal, is a mere matter of favour or indulgence.

Courts will sometimes enlarge or suspend their rules when the ends of justice require it to be done. But there is nothing of that kind here. It appears to be the common case of a special bail neglecting to avail himself of the time allowed him to surrender his principal; and there is nothing to find fault with, in the refusal of the court to receive the surrender after the expiration of the time.

Rules of court are necessary to the due administration of justice; but the rule in question would be perfectly useless, if in such a case as this it is not to be enforced.

This is, moreover, an interlocutory proceeding on which an appeal will not lie.

APPEAL DISMISSED.

ELLIOTT *vs.* GIESE.—June, 1826.

The defendant signed, and addressed to the plaintiff, the following note. "Agreeable to promise I was to call on you this evening, but being too unwell, &c. I must beg to be excused; yet as the meeting was to be for the purpose of guaranteeing unto you a debt due you by my brother-in-law, J. G, amounting to, &c. I hereby guarantee the said sum."—*Held*, that the consideration did not sufficiently appear on the face of the instrument, under the statute of frauds 29 *Car.* II, *ch.* 3, *s.* 4, and that it was *nudum pactum*, and void.

APPEAL from *Baltimore* County Court. This was an action of *assumpsit.* The declaration contained two counts. 1. That one *Joseph Galbraith*, on the 5th of November 1819, was indebted to the plaintiff, (the appellant,) in $105, for money paid, laid out and expended, by the plaintiff, to and for the use of the said *Galbraith*, and at his special instance and request; and being so indebted he promised, &c. and afterwards, on the 6th of November 1819, in consideration of the premises, and to secure the payment of the said sum of money by the said *Galbraith* to the plaintiff, the defendant, (the appellee,) upon himself assumed, and did then and there guarantee to the plaintiff the payment of the said sum of $105, so due by the said *Galbraith* to the plaintiff, in case the said *Galbraith* should fail to pay the same. Averment, that *Galbraith* hath not paid, &c. of which the defendant had notice, &c. By reason whereof the defendant became liable, &c. and being so liable undertook, &c. 2. A similar count for another sum of $105, due from *Galbraith* to the plaintiff, for meat, drink, &c. The defendant pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiff offered in evidence the following letter from the defendant to the plaintiff, and which was *admitted to be in the defendant's* handwriting: "Dear Sir, Agreeable to promise I was to call on you this evening; but being too unwell with the head-ache, I must beg to be excused; yet as the meeting was to be for the purpose of guaranteeing unto you a debt due you by my brother-in-law, *Jos. Galbraith*, amounting to one hundred and five dollars, I hereby guarantee the said sum. I remain yours, &c.

L. W. H. Giese.

Guarantee for $105. *Philadelphia,* 6th Novr. 1819." Addressed to "Mr. *Wm. Elliott, Philad.* 43, N. 3d."

The defendant then prayed the opinion and direction of the court to the jury, that the said writing created no liability on the part of the defendant, and that for that reason the plaintiff was not entitled to recover. And the Court [*Archer*, Ch. J. and *Hanson* A. J.] being of that opinion, so directed the jury. The plaintiff excepted. Verdict and judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN, and DORSEY, J.

R. Johnson, for the Appellant, cited *Russell vs. Moseley*, 3 *Brod. & Bingh.* 211, *(7 Serg. & Lowb.* 414.*)*

R. B. Magruder and *C. C. Harper*, for the Appellee, were stopped by the court.

BUCHANAN, Ch. J. delivered the opinion of the Court. This is clearly an undertaking to answer for the debt of another, and though, being in writing, and signed by the defendant, the statute of frauds is so far gratified; yet in the absence of any superadded consideration moving between the plaintiff and the defendant, either of forbearance or otherwise, it is *nudum pactum*, and void.

The declaration avers the consideration to be a preexisting debt due from *Joseph Galbraith* to the plaintiff, and sets out no other; and the instrument of writing itself, on which the suit was brought, is, upon the face of it, a naked and express guarantee of that debt, without any apparent new consideration moving between the parties to that guarantee.

The case of *Wyman vs. Gray* decided this term, *(ante* 409,) is decisive of this case.

JUDGMENT AFFIRMED.

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GIESE *vs.* THOMAS.—June, 1826.

In an action of replevin the former owner of the goods replevied, is not a competent witness for the plaintiff, to prove that he had previously sold them to the plaintiff and that they had subsequently been sold under an

execution upon a judgment of a third person, and purchased at such sale by the defendant; as no parol evidence could be given of such judgment and execution, no foundation being first laid for it.

But if the judgment and sale to the defendant had been first properly proved, the former owner would have been a competent witness to prove a previous sale by him for a valuable consideration to the plaintiff.

A vendor is not generally a competent witness to prove title in his vendee against a stranger, claiming adversely, as he is interested by reason of his implied warranty in supporting the title of the vendee.

Appeal from *Baltimore* County Court. Action of replevin. Property in the defendant pleaded. General replication, and issue joined. The plaintiff, (the appellant,) produced as a witness *Thomas Evans*, for the purpose of proving, that on the 3d of October 1821, he *Evans*, and one *Coppack*, sold the lumber replevied to the plaintiff, who paid them for it; that at a subsequent period a *fieri facias*, under a magistrate's judgment, rendered in favour of a certain *John Mulliken* against said *Evans*, was levied upon it by *Samuel Merryman*, constable; that the plaintiff gave notice to *Merryman* before the levy, that the property had been sold to him, the plaintiff; that *Merryman* nevertheless proceeded to sell it at public sale, and the defendant became the purchaser, who also had received notice that the *fieri facias* was levied for the purpose of making the sum necessary to satisfy the judgment so obtained against *Evans*. To the competency of the witness for this purpose, the defendant objected. And the Court, [*Hanson* and *Ward*, A. J.] being divided in opinion, he was rejected. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Ch. J. and Earle, Stephen, and Dorsey, J.

R. B. Magruder, for the Appellant, contended, 1. That *Evans* was not interested, and, therefore, that the court erred in rejecting his testimony upon the ground of his incompetency. He cited *Fisher vs. Beall's Adm'rs.* 1 *Harr. & Johns.* 31.

2. That if he was interested, his interest was equiponderant, and, therefore, he ought to have been admitted as a witness. *Norris's Peake*, 242.

3. That he was a witness from necessity.

Meredith, for the Appellee, cited *Heermance vs. Vernoy*, 6 *Johns. Rep.* 5; and *Blasdale vs. Babcock*, 1 *Johns. Rep.* 517.

Buchanan, Ch. J. delivered the opinion of the Court It appears that issue was taken in this case, on a plea of property in the defendant, and it comes up on a rejection by the court below of the evidence offered at the trial on the part of the plaintiff.

There is no doubt the plaintiff might have shown that the property in question was sold by a constable to the defendant, in virtue of a *fieri facias* sued out on a judgment rendered by a magistrate against the witness *Evans*, in order to show in what manner the property got into the possession of the defendant, and to let in the further evidence, that it had been previously sold by *Evans* and *Coppack* to the plaintiff, for a valuable consideration, which *Evans* might have been called to prove, as in that state of things he could have had no interest opposed to his competency. For if the property, at the time of the supposed sale to the plaintiff, was in truth bound by the delivery of the *fieri facias* into the hands of the proper officer, *Evans* would have been answerable over to the plaintiff on the implied warranty of title, and consequently, in proving the sale to the plaintiff, he would have been swearing against his interest. And if on the contrary, it was not bound, the seizure and sale by the constable to the defendant, could not have had the effect to subject *Evans* to any liability to the plaintiff, on account of any implied warranty; but the remedy of the plaintiff would have been that which he is now seeking against this defendant; or an action against the constable for the wrongful taking. And in neither case would *Evans* have any interest of his own to subserve by proving the previous sale by *Coppack*, and himself, to the plaintiff.

But it certainly was not competent to the plaintiff to give parol evidence of the judgment and execution against *Evans*, no foundation being previously laid for it. They should themselves, if in existence, have been produced; and the testimony of *Evans*, in relation to that matter, was clearly inadmissible.

Stripped then of all evidence of a sale to the defendant under an execution on a judgment against *Evans*, the offer to prove by him a sale of the property in question by *Coppack*, and himself, to the plaintiff, stands as the naked case of a vendor coming to sustain, by his own testimony, the title of his vendee, against a stranger claiming adversely, which cannot be permitted.

Evans is clearly interested on account of his implied warranty, in supporting the plaintiff's action, and his testimony was properly rejected.

JUDGMENT AFFIRMED.

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VEASEY'S Adm'r. *D. B. N. vs.* BASSETT'S Adm'rs.—June, 1822(*a*).

In an action of *assumpsit* in consideration of forbearance to sue a bond dated in 1793, payable the 1st of November 1798, whereby the bond became barred by the act of limitations. The writ was issued in 1817, and the defendant pleaded limitations. Evidence was given that in 1814 and 1815, the agent of the plaintiff applied to the defendant, with the bond, to get him to settle it, either by paying the money, or renewing the bond, and the defendant promised that he would pay the money, and hoped for further indulgence; that he had made a payment for which he had not been credited, and that he would call on the plaintiff and renew the bond. There were sundry payments endorsed on the bond, the last in 1815; the original bond was lost, and copy of it, with endorsements, was proved. Also an order drawn by the plaintiff on the defendant in 1814, which was paid by him—*Held*, that the evidence was sufficient to support the action. That it could be supported, although the jury might not believe that the agent of the plaintiff was authorised to forbear to sue the defendant, and that he did forbear to sue, and that in consequence thereof, the defendant promised to pay him, and although the promise to pay of the defendant, made to the agent, was in consequence of the plaintiffs' previous indulgence.

The court refused to direct the jury, that the plaintiff must satisfy them by evidence of the correct balance due from the defendant to him, and that the evidence of the promise in 1815, and the other evidence, was not sufficient to ascertain the balance.

APPEAL from *Kent* County Court. This was an action of *assumpsit* brought by the appellees against the appellants. The declaration alleged, "that whereas the said L, (the defendant's intestate,) in his lifetime, on the 1st day of November 1793, by his certain writing obligatory, sealed with the seal of

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(*a*) This case was omitted to be published in its proper place.

the said L, bearing date the same day and year aforesaid, acknowledged himself to be held and firmly bound unto the said R, (the plaintiffs' intestate,) in his lifetime, in the full and just sum of £1380 17 2, with a condition thereunder written for the payment of £690 8 7, with interest thereon, from the date thereof, on or before the 1st day of November 1798, which sum of £690 8 7, with the interest thereon, the said L did not pay to the said R, on or before the 1st day of November 1798, according to the form and effect of the said condition, whereby the said writing obligatory became forfeited. And afterwards, that is to say, on the 1st day of January 1815, at *Kent* county aforesaid, he the said R intended to implead and prosecute the said L, upon the said writing obligatory, forfeited in manner aforesaid, of which said intention the said L having notice, the said L the day and year last aforesaid, at the county aforesaid, in consideration that the said R would forbear from thence to presecute his said suit upon the said writing obligatory against the said L, he the said L then and there undertook and faithfully promised the said R, that he the said L would well and truly content and pay the said R the said sum of £690 8 7, with interest thereon, when he should be thereto required. And the said plaintiffs, in fact say, that the said R confiding in the said promise and undertaking of the said L, did from thence forbear to prosecute his said suit against the said L, upon the said writing obligatory. And whereas, also the said L, afterwards, to wit, on the same 1st day of November, in the year of our Lord 1793, at *Kent* county aforesaid, by his certain other writing obligatory, sealed with the seal of the said L, bearing date the same day and year aforesaid, acknowledged himself to be held and firmly bound unto the said R, in the full and just sum of £1380 17 2, with a condition thereto subscribed, that if the said L should well and truly pay to the said R, the just and full sum of £690 8 7, with legal interest thereon from the date of the said writing obligatory, on or before the 1st day of November 1798, that then the said last mentioned writing obligatory should be void and of non-effect. Which last mentioned sum of £690 8 7, with the interest thereon, as aforesaid, the said L did not pay to the said R, on or before the said 1st day of November 1798, according to the form and effect of the said last mentioned condition, whereby the said writing obligatory became forfeited. And the plaintiffs further say, that the said L, at divers days and times, after the forfeiture of the said last mentioned writing obligatory, and before the making of the promise and assumption hereafter mentioned, paid and satisfied to the said R divers sums of money, amounting in the whole to £100, in part of the sum so as aforesaid due and owing upon the said last mentioned writing obligatory; and that at the special instance of the said L, the said R had, from the time of the forfeiture of the said last mentioned writing obligatory, continually forborne for twelve years and more to prosecute his suit upon the said last mentioned writing obligatory against the said L, to wit, at *Kent* county aforesaid; by reason whereof the said R was precluded from having and maintaining his said action against the said L, upon the last mentioned writing obligatory, according to the provision of a certain act of assembly of the (then province, now) state of *Maryland*, passed at a session thereof begun and held at the city of *Annapolis*, the twenty-sixth day of April in the year of our Lord 1715, entitled, "An act for the limitation of certain actions for avoiding suits at law." In consideration of all which said premises the said L afterwards, to wit, on the 1st day of January in the year of our Lord 1815, at *Kent* county aforesaid, undertook and then and there faithfully promised the said R, to pay to the said R, when afterwards he should be thereto required, so much money as then remained unpaid of the said last £690 8 7, with interest thereon, from the date of the said writing obligatory. And the plaintiffs further in fact say, that on the day and year last above mentioned, the sum of £590 8 7, remained due and unpaid to the said R, out of the said last mentioned sum of £690 8 7, whereof the said L, afterwards, that is to say, on the same day and year last aforesaid, at the county aforesaid, had notice." There was also a count for £590 8 7, the like sum of money had and received. The original writ was issued on the 10th November 1817. The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, *actio non accrevit infra tres annos*, and *plene administravit*, to which there were the general replications and issues.

1. At the trial the plaintiffs proved by J. C, a competent witness, that he the witness, some time in March 1814, as the agent of *Richard Bassett*, the plaintiffs' intestate, called on *Lambert Veasey*, the defendant's intestate, at his house in *Kent* county, for the purpose of getting him to settle off his bond to *Bassett*, either by paying the money, or by renewing his bond. That *Veasey* answered there was a credit that he was entitled to for wheat, which he had delivered to *Bassett*, which he could not then ascertain, but that he would in a short time go up to *Cecil* county and see Mr. *Bassett*, and renew the said bond. The witness further proved, that some time in March 1815, he called again on *Veasey* for the purpose of getting the bond settled, and observed to *Veasey* that he had not complied with his promise in coming up to *Cecil* county and renewing his bond. to which the said *Veasey* said, that the reason why he did not do so, was that *Bassett* had drawn an order on him in favour of *G. W. Thomas*, which he had paid, and which had taken all his money, and that he the said *Veasey* would be up in about three weeks and renew his bond; and he further told the witness that *Bassett* need not be uneasy about his debt, for that it was very safe; that the farm he then lived on belonged to him, and was paid for, and that he *Veasey* would pay him to the uttermost farthing what he owed him, as *Bassett* had been very indulgent to him, and he hoped he would still indulge him further, and that he was and had been the best friend he had in the world, and that he should never lose any thing by him. The witness further proved that he had no orders from *Bassett* to sue, nor did he say any thing about it. The plaintiffs also proved that the original bond, the execution of which was proved by J C, of which the paper herein mentioned is a copy, was in the possession of the said J C, the witness, and produced by him to *Veasey* at the time of the abve conversations stated to the witness, and that the said bond has since been lost, and that the copy of the bond, and of the endorsements which he produced, was a true copy. It purported to be a copy of a joint and several bond, executed on the 1st of November 1793, by *Lambert Veasey*, *William Veasey* and *John Makin*, to *Richard Bassett*, in the penalty of £1380 17 2, money of *Pennsylvania*, conditioned for the payment of £690 8 7, on

or before the 1st of November 1798, with legal interest. A payment of £18 5 0 was endorsed as made on the 15th of October 1794; also £64 2 0 on the 15th of April 1796; also $39 72 paid *G. W. Thomas*, on the 12th of December 1814, and $133 59 paid to *R. C. Lusby*, on the 20th of February 1815. The plaintiffs further proved by *G. W. Thomas*, that on the 27th of October 1814, he called on *Bassett* for his taxes, which he paid to the witness in part, and gave him an order for the balance on *L. Veasey*, for the sum of $39 72. That he called on *Veasey* afterwards, he does not know when, and presented him with the said order, which *Veasey* paid, and observed to the witness that he owed *Bassett*, and that he had been one of the best friends he ever had, and had acted a fatherly part by him. The defendant then moved the court to direct the jury, that the evidence given on the part of the plaintiffs, was not sufficient to support the issues joined on their part. But the Court [*Purnell*, A. J.] refused to give the direction. The defendant excepted.

2. The defendant then prayed the court to direct the jury, that if they should believe the evidence on the part of the plaintiffs to be true, it is not sufficient to support the issues on their part. Which instruction the court refused to give. The defendant excepted.

3. The defendant then prayed the court to direct the jury, that unless they should believe from the evidence that J C the witness was authorised by *Bassett*, the plaintiffs' intestate, to forbear to sue the defendant's intestate, and that he did forbear to sue, and in consequence thereof the defendant's intestate did promise to pay him, that this action cannot be supported. Which instruction the court refused to give. The defendant excepted.

4. The defendant then prayed the court to direct the jury, that if they shall believe from the evidence, that the declarations of the obligor made to the witness J. C, were in consequence of *Bassett's* previous indulgence, that this action cannot be maintained. Which instruction the court refused to give. The defendant excepted.

5. The defendant further prayed the court to direct the jury, that the plaintiffs must satisfy them, by evidence, of the correct balance due from *Veasey* to *Bassett*, and that the general evidence given by J. C. the witness, of the assumption in 1815, and also the evidence of Doctor *Thomas*, the witness, together with all the testimony given, were not sufficient to ascertain the balance, even if the jury believed all the testimony to be true. Which instruction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at June term last, before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Carmichael, for the Appellant.

Chambers, for the Appellees, cited, 1 *Com. Cont.* 9, 10, 23, 25. 1 *Saund.* 264, *(note* 1.*)* 1 *Chitty Plead.* 95, 96. *Hawkes vs. Saunders*, 1 *Cowp.* 290. *Atkins vs. Banwell*, 2 *East*, 505. *Inhabitants of Andover vs. Inhabitants of Salem*, 3 *Mass. Rep.* 438. 2 *Saund.* 137, *(note* 2.*) Wennall vs. Adney*, 3 *Bos. & Pull.* 249, *(note a.) Beach vs. Lee*, 2 *Dall. Rep.* 257. *D'Utricht vs. Melchor*, 1 *Dall. Rep.* 428. *Heard vs. Wadham*, 1 *East*, 630. *Baird vs. Blaigrove*, 1 *Wash. Rep.* 170. *White vs. Parkin*, 12 *East*, 578. *Foster vs Allanson*, 2 *T. R.* 479, 483. *Barnes vs. Headley*, 2 *Taunt.* 184. 2 *Com. Cont.* 557. *Fowler vs. Sheaser*, 7 *Mass. Rep.* 14. *Trueman vs. Fenton*, 2 *Cowp.* 544. *Elting vs. Vanderlyn*, 4 *Johns. Rep.* 237. *Cole vs. Saxby*, 3 *Esp. Rep.* 159. *Davies vs. Smith*, 4 *Esp. Rep.* 36.

Curia adv. vult.

At this term,

JUDGMENT AFFIRMED.

◆

PIKE *vs.* DASHIELL'S Adm'r.—June, 1823 *(a.)*

Separate actions cannot be maintained on a joint promissory note made by two, since the act of 1811, *ch.* 161.

APPEAL from *Somerset* County Court. This was an action of *assumpsit* on a *joint* promissory note executed by *Dashiell*

(a) This case was omitted to be published in its proper place.

(the defendant's intestate) and one *Bennett*, on the 6th of October 1817, promising, six months after date, to pay to the plaintiff, (now appellant) or order, $69 14, for value received. The following case was stated for the opinion of the court: *Bennett* and *Dashiell* jointly executed the note above stated. Soon after its execution *Dashiell* died intestate, and letters of administration on his estate were granted to the defendant. *Bennett* survived *Dashiell*, is now living, and has been relieved under the act for the relief of insolvent debtors. This suit was brought against the defendant for the recovery of the money due on the said note. The defendant pleaded in abatement that the note was joint and not several. The question for the court to decide was, whether or not the defendant was liable in a court of law for the payment of the money by virtue of the act of assembly of 1811, *ch.* 161? The county court gave judgment on the case stated, for the defendant; and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, EARLE, DORSEY and STEPHEN, J. by

J. Bayly, for the Appellant, and by
T. Bayly, for the Appellee.

JUDGMENT AFFIRMED.

* * *

KING *vs.* MADDUX'S EX'R.—June, 1824 *(a.)*

Proof that the articles charged in the day book of the plaintiff were in the handwriting of a clerk of the plaintiff, who was dead, admitted as proper and competent evidence.

The defendant cannot claim an entry in the day book of the plaintiff as evidence of a credit, without all entries on said book, in which the defendant is debited, going to the jury as evidence.

APPEAL from *Somerset* County Court. *Assumpsit* for goods sold and delivered, and articles properly chargeable in account, as by account filed. Plea, *non assumpsit*.

1. At the trial the plaintiff, (now appellee) produced the day book of his testator, and offered evidence to prove that *Tho-*

(a) This case was omitted to be published in its proper place.

mas Gilliss, who had been a clerk of the testator, was dead, and that a number of the articles charged in the account of the plaintiff against the defendant, (the appellant,) were in the handwriting of *Gilliss*. To the admission of this evidence the defendant objected; but the Court, [*Robins* and *Whittington*, A. J.] overruled the objection, and admitted the evidence as proper and competent. The defendant excepted.

2. The defendant then claimed the benefit of, and credit for, an entry made on the said day book, and proved to be in the handwriting of the plaintiff's testator, for ten cords of wood at $2 50 per cord, credited to the defendant in said book the 16th of December 1818. But the court were of opinion that the defendant could not claim the said entry as evidence of said credit, without all entries in the handwriting of the plaintiff's testator on said book, in which the defendant was debited, also going to the jury as evidence to prove the charges entered at other times than the day of the entry of said credit. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Earle and Stephen, J. by

T. Bayly, for the Appellant, and by
Wilson, for the Appellee.

JUDGMENT AFFIRMED.

Bosley *vs.* M'Kim.—June, 1826.

L, the owner of a parcel of ground in the city of *Baltimore*, wishing to dispose of it, caused it to be laid out into lots and alleys, for the benefit of the lots, and a plot of the whole to be made, and afterwards sold the lots at public sale, as located on the plot, which was exhibited at the sale. M became the purchaser of lots Nos. 1 and 13, divided on the plot by a N and S 10 feet alley, and beginning, each of them, at the upper end of the alley; and B and F, and others, purchased the lots below, which were separated by the same alley, and bounded by it. L afterwards conveyed to M, not only the lots 1 and 13, but that part of the said alley which intervened between them; and M, supposing himself to have title to the soil of that part of the alley itself as well as to his lots, built upon a part of it. There was some evidence to show that it was understood at the sale that the purchaser of those two lots was also to have the intervening portion of the alley. After M's building had been erected several years B, one of the purchasers of the lower lots, began to question M's right to the alley itself between his two lots, and his right to put his building upon it; and the difference between them terminated in a deed of compromise, by which M, relinquished all right to the use of the alley below his lots to B & F, and they relinquished all their right to M, to the part of the alley between M's lots. M afterwards sold his said lots and building to J, and conveyed them to J, expressly subject to the said deed of compromise betweeh M and B & F. After J's purchase, B prevented his using that part of the alley below his said lots 1 and 13, by obstructions placed in the same. On a bill filed by J to have those obstructions removed, and himself quieted in the enjoyment of this part of the alley, and alleging that the said deed of compromise was obtained from M, by fraud and threats, on the part of B, and in mistake of M's rights, and praying to have that deed set aside so far as it restrained M from the use of said part of the alley—*Held*, 1. That from all the evidence in the cause M was not to be considered as the purchaser at the original sale of the alley intervening between lots 1 & 13.

Held 2. That not having so purchased, there was a sufficient consideration for his deed of compromise with B & F.

Held 3. That even if M had legal title to the alley between his said lots, by virtue of his conveyance from the original proprietor, yet as J bought from him expressly subject to the said deed of compromise, J was not entitled to the relief he prayed.

Held 4. That although the deed of compromise might not operate at law as a transfer, of the right of the parties to it, to the use of the alley, on the ground that that right was a right of way, appendant to the lots, and could not be severed from the lots themselves; yet that in equity it would operate sufficiently to effect the design of the said parties.

Held 5. That upon the whole case J had no equity to support his application for the relief prayed by him.

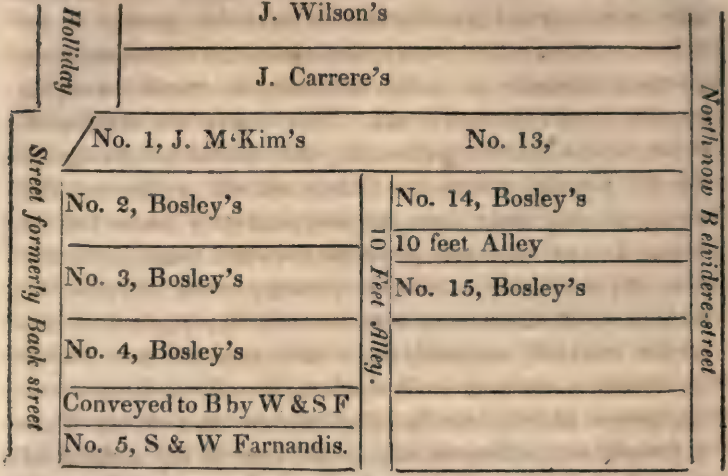
There is no case in which a court of equity ever granted a perpetual injunction to a plaintiff to protect him in the enjoyment of a naked legal right, which he, or those under whom he claims, have stipulated by deed not to exercise—Per *Dorsey* J.

Legal rights are to be asserted by legal means; and in such cases courts of equity never lend their aid where equity and justice do not imperiously demand it. *Ibid.*

Bill dismissed, but *without costs*.

Appeal from *Baltimore* County Court, sitting as a court of equity. The bill in this case was filed by the appellee for an injunction to prevent the appellant from obstructing a certain alley, and debarring him from the use of it. The bill states, that *Elizabeth Lawson*, since deceased, being entitled to, and seized in fee simple of and in a parcel of ground, lying and being in the city of *Baltimore* between what are now called *Holliday-street* and *Belvidere* (formerly *North,) street,* caused the same to be divided into lots and alleys, for the benefit thereof, and a plot of the whole to be made, with a view to expose the same to sale, in or about the year 1809, of which division, the plot, or diagram, exhibited, *(marked A,)* is a true representation. That on or about the 1st of December 1809, the said *Elizabeth Lawson,* by her agent *Charles Brown,* caused the said lots, or some of them, to be set up to public auction, the said agent attending the same, together with *Henry W. Rogers,* attorney at law, on the part of the said *Elizabeth*; that at the said sale, which was made and conducted by *Thomas Yates,* an auctioneer of the said city, *Jacob Myers,* became the purchaser of the lot number *one,* and of the lot number *thirteen,* with an understanding, that the portion of the north and south ten feet alley, intervening between the said two lots, should be included in his purchase, and that he should have the same right and title to that as to the lots themselves; as will appear by the deed for the same, to *Myers.* That at the said sale, *James Bosley,* (the appellant,) became the purchaser of the lots number *two,* and number *fifteen*; that *John Small* became the purchaser of lots number *three, four* and *fourteen*; and that *Samuel* and *Walter Farnandis* became the purchasers in common, of the lot number *five*; all of which last mentioned lots, bounded on the said north and south ten feet alley. The bill further charges, that although the said lots had been divided, and the said alleys planned, as shown in *exhibit A,* and had been accordingly laid down in a plot which was produced at the said sale, it was distinctly announced and explained at the sale, that the purchaser of the two southermost lots number *one* and number *thirteen,* would have the advantage of building over the alley, which on the plot interposed between them, and that this advantage was one of the inducements with *Myers* to become the purchaser of both, and enhanced the price of, and multiplied bidders for them. That at the said sale, the auctioneer, or some of the persons present, on the part of Mrs. *Lawson,* in pursuance of the said explanation, connected the said two southermost lots as laid down on the said plot, and purchased by *Myers*, by continuing the east and west lines with a black-lead pencil, across the said ten feet alley, so as to make one lot of the two southermost lots, and the intermediate portion of the said alley. That the said north and south ten feet alley was designed for the accommodation of the purchasers of the lots bounding thereon, as a way or passage, and as an outlet for rain water, and other similar purposes, through the ground of the said *Elizabeth Lawson*, down to *Jones's Falls*, and that there was no outlet at the south end of the said alley, which was met by the lot of *John Carriere*, as shown in *exhibit A;* that, therefore, the continuance of the alley between the lots number *one* and number *thirteen*, purchased by *Myers*, could be of no importance or value whatsoever, to any of the purchasers of the lots bounding on the other, or lower portion of the alley; and that this consideration enabled the auctioneer, and those acting for Mrs. *Lawson* at the sale, to represent and sell, at a better price, the lots number *one* and *thirteen*, and the intermediate part of the projected alley, as one lot, and to one person, without any prejudice to the purchasers of the other lots, who, moreover, must have known, in the course of the sales, what was so as aforesaid announced and explained as an advantage connected with the said upper or southermost lot. That *Bosley*, sometime after the said sale, received from *John Small*, an assignment of his purchases aforesaid; and that on or about the 16th of December 1811, deeds of conveyance were prepared and executed to *Myers*, to *Bosley*, under his own purchases, and also as assignee of *Small*, and to *Samuel* and *Walter Farnandis*, which were duly acknowledged and recorded among the land records of *Baltimore* county. That these deeds were prepared by the said *Henry W. Rogers*, who was present when the said sales were made, and knew the extent, nature and terms, of the said several purchases, and acted as agent or attorney of Mrs. *Lawson;* that the deed to *Myers*, (which is exhibited *marked E,)* corresponds precisely with the statement, herein before made, relative to the portion of the north and south ten feet alley, intermediate between the lots number *one* and *thirteen*, which it includes within the metes and bounds expressed in it, as a part of *Myers's* purchase and title; for it professes to begin for the said purchase on the west side of *Holliday-street*, at the distance of 319 feet northerly from the intersection of the northwest corner of *East* and *Holliday-streets*, thence to run easterly, parallel with *East-street*, and binding on the north end of *Holliday-street*, 35 feet to *Back-street* or *Holliday-street* united, thence north, binding on *Back-street* or *Holliday-street* united, 31 feet, to lot number *two*, purchased by *Bosley*, thence west, parallel with *East-street*, and binding on lot number *two*, running 187 feet to *North-street*, (now *Belvidere-street*,) which crosses the said alley, thence south, binding on *North-street*, (now *Belvidere-street*) 31 feet, thence east with a straight line to the beginning, (which again crosses the said alley,) "with the privilege of an outlet through a ten feet alley *at the back of lot number two*;" so that the whole south end of the projected alley, lying between lots number *one* and *thirteen*, was comprehended in, and passed in full property by the said conveyance, in the same manner, and to the same extent and effect, as the lots themselves, and the whole were conveyed as one lot, described by the above recited outbounds, and the terms in which the privilege of the outlet through the ten feet alley is granted by the said conveyance, are in strict conformity with the aforesaid metes and bounds, given of the ground, intended to be conveyed, since the privilege is made to apply only to the alley, as having its first existence on the south, *at the back of lot number two*. That while the metes and bounds of the deed to *Myers*, comprehended the intervening portion of the ten feet alley, and the description of the privilege of the outlet through the alley corresponded with the conveyances to *Bosley* and *Samuel* and *Walter Farnandis* excluded the other part of the projected alley, and bounded their several lots upon it, and did not even give in their terms, the privilege of the said alley as an outlet, however the grant of it may be implied from the expressions actually used by way of reference to the alley, as laid out and existing, and as bounding their lots. That *Bosley* afterwards purchased a part, (with a front of seven feet on *Holliday-street*) of the lot, so bought by, and conveyed to, *S.* and *W. Farnandis*, which part is particularly shown in *exhibit A*, and which was conveyed by them to *Bosley*, by deed bearing date the 31st of July 1812. The bill further states, that very soon after the sales, to wit, in the spring of 1810, *Myers* begun to build a valuable dwelling-house, with extensive back buildings, on the said lot, and completed the same within about a year from its commencement, of which the kitchen covered all but three feet of the said part of the north and south ten feet alley, included as aforesaid within the lines of his purchase and deed, and the said three feet were covered by a continuation of the building for other purposes. That *Bosley* was not only apprised of the commencement and progress of the said buildings, as he lived in *Baltimore*, and could not fail to know it, but constantly saw, and actually witnessed the same, and not only made no objection whatever thereto, but built at the same time a dwelling-house on his adjoining lot, number *two*, which is now standing, and shared in the expense of the party wall between his said house and *Myers's*, and countenanced and concurred in the said acts of *Myers*. That *S. & W. Farnandis*, also knew of the commencement and progress of the said buildings by *Myers*, and did not object thereto, or allege any right to, or interest in, the said part of the said ten feet alley. That *Myers*, being so entitled in law and in equity to the whole of the ground comprehended within the metes and bounds of his said purchase and deed, including the said part of the said projected alley; and having, under the fullest conviction, and in the assertion of such his title, and with the knowledge, and even the concurrence of *Bosley*, and with the knowledge and implied assent of *S.* and *W. Farnandis*, built upon the same, actually resided in the said house with his family, and used and occupied the same, and the other buildings and improvements on the said lot, for three or four years, or more, without any objection being made by *Bosley* or *S. & W. Farnandis*, who were fully acquainted with their own rights, whatever they might be to the covering with his said buildings the said part of the ten feet alley; but that in or about the year 1815, *Bosley*, in his own name, and in those of *S. & W. Farnandis*, for the first time questioned the right of *Myers* so to cover with his buildings the said part of the alley, and began to threaten to disturb him in the occupation thereof, and insisted that he could make him pull down, and take away, such portion of his said buildings or improvements as were placed upon the alley, in virtue of a right in himself, or on himself and *S. & W. Farnandis*, to the use of the said part of the said alley; and soon afterwards *Bosley* began to obstruct the communication between the said buildings and lot of *Myers*, and the alley, by a mound or wall, which, however, *Bosley* the same day removed, admitting that he could not lawfully persist in such obstruction; but he, *Bosley*, continued to assert that he could compel *Myers* to open the alley through his said buildings, and alarmed *Myers* with groundless fears for his title to the said part of the said alley, and for his buildings thereon erected; until at length *Myers* was induced by *Bosley*, his conduct and representations, to doubt his own unquestionable rights, and mistake the value of the pretences of *Bosley*, and, being anxious to avoid a law suit, and being somewhat indifferent to the enjoyment of a right of passage along the said alley, and being, moreover, assured by *Bosley*, that the water issuing from his said buildings and lot, through the said alley, should not be stopped, unless it became a nuisance, he consented to a proposition made by *Bosley*, that he, *Myers*, should give up his interest in the said ten feet alley, and in the other ten feet alley, (shewn in *exhibit A*, and running east and west,) to *Bosley* and *S. & W. Farnandis*, in consideration of their securing his title by a release or conveyance to that part of the said alley on which his buildings and improvements stood. Whereupon a deed was prepared to that effect, (to which *Myers* and *Bosley*, and *S. & W. Farnandis*, were parties,) which was acknowledged, and recorded in *Baltimore* county court, and marked *Exhibit F*. That the sole consideration of the release, or surrender or transfer, of the indisputable interest of *Myers*, in the said alley, to *Bosley* and *S. & W. Farnandis*, (as sufficiently appears by the deed itself,) was the reciprocal release or transfer of the pretended right of *Bosley* and *S. & W. Farnandis*, to the said part of the said originally projected alley, built upon as aforesaid, by *Myers*, which right *Myers* was made to apprehend, might be used to the great injury, and even destruction of his valuable buildings, and the great diminution of the value of his lot; whereas the said alleged right, or any right whatever, in *Bosley* and *S. & W. Farnandis*, had no existence, but was a mere fiction, and, therefore, that the said release or surrender, or transfer, by *Myers*, was without any real consideration, although *Myers* erroneously believed, and was persuaded to believe, that it was otherwise; and moreover, not only was the said surrender, or release or transfer, without consideration, and the result of mistake and misapprehension on the part of *Myers*, of his own rights, and of those of the other parties aforesaid, but that it was obtained by *Bosley* by threats of putting his unfounded claim in execution, and produced by fears on the side of *Myers*, and of menace and management on the side of *Bosley*, resorted to for the purpose of alarming and misleading *Myers*. That the confidence of *Myers* in the above mentioned assurance of *Bosley*, that the water from his buildings and lots should not be stopped unless it produced a nuisance, contributed to influence his mind to agree to the said proposal of *Bosley*, and to become a party to the said deed. The bill also states that the said deed, between the said parties, did not in law pass as a grant from *Myers*, since the interest (as an incorporeal hereditament or however else,) of *Myers* in the said alley, below or to the north of his lot, was *appendant to his interest in the lot itself*, and without a transfer of the lot, to which it was annexed, could only pass to the owners of the soil of the said alley, the representatives of *Elizabeth Lawson*, by a release or surrender; and that if considered as a contract merely, neither *Bosley* nor *S. & W. Farnandis* can derive any right to it *at law*, other than a right of action against *Myers*, (if ever that could be maintained,) and in equity no right of any sort, especially a right to lay rubbish and obstructions upon the said alley in which they could have nothing more than an easement. The bill further states, that in the year 1816 the complainant bought the said house and lot from *Myers* for a very large sum of money, and on the 7th of November, in the said year, received from him conveyance thereof in fee, with the appurtenances, which conveyance was duly acknowledged and recorded That when he so bought the said house and lot, he was told by *Myers*, that the water could not be stopped from flowing through the said alley, by *Bosley* or *S. & W. Farnandis*, unless it should become a nuisance, and he received the said house and lot upon that confidence, which he found to be encouraged by the fact, that during the whole occupation of *Myers*, which he thinks continued until some time in the year 1817, the water was never prevented from flowing from the said house and lot through the said alley. That for sometime after his said purchase of the said house and lot, (of which he took immediate possession, and in which he has ever since resided with his family,) he never heard an idea intimated by *Bosley*, or any other person, that the flowing of the said water could be stopped; but that in or about the spring of the year 1821, *Bosley* mentioned to the complainant that he had a right to the said alley by a contract with *Myers*, or something to that effect, to which the complainant replied, that, at any rate, he could not obstruct or prevent the flowing of the water through it, from the complainant's lot, if it did not become a nuisance, or to that effect; and *Bosley* did not then press the subject any farther, and did not afterwards do so until very lately, when he began to insist upon his right wholly to prevent the flowing of the said water along the said alley; and, upon the complainant's refusing to acknowledge such right, he proceeded, in violation of his aforesaid assurance to *Myers*, upon which the complainant, as well as *Myers*, had relied, and without any colour of law or justice, to erect obstructions across the said alley, in contact with the wall of the complainant's said house, where the water issues into the said alley, which the complainant caused to be peaceably removed; but *Bosley*, within a few days past, to wit, on the, &c. still persisting in his determination wholly to prevent the flowing of the water from the complainant's said house and lot, through the said alley, hath made another obstruction to the same, covering the head of the said alley, in its entire breadth, with stones, and sand, and rubbish, strewed in and extended in length down the said alley of about twenty or thirty feet, and in thickness or height about two feet, against and touching the said wall of the complainant's house, and having no other object, and answering no other purpose, but to produce the said obstruction, and being of no, or inconsiderable value in themselves, and of as much value in themselves, if removed from their present position, as there; which obstruction *Bosley* caused to be made by a great number of sailors, and others, who, with *Bosley*, appeared resolved to accomplish their said work forcibly if any attempt should be made to interfere with them; and all this has been done by *Bosley*, without any authority from *S. & W. Farnandis*, or *James Biscoe*, who purchased from them, and now resides in a house built on the aforesaid lot of *S. & W. Farnandis*, or from any other person, he, *Bosley*, claiming to himself a right to use the said part of the said alley (at the back of his house and lot, number *two*, herein before mentioned,) as if he had full property in the soil thereof, and not a mere right of passage over it, and of use to it as an alley, or as if he only had that right of passage and use, or in the assertion of such a right, could do an act, which, as far as it goes, destroys all passage, and amounts, as the complainant is advised, to a trespass upon the owners of the soil of the alley, and an usurpation upon the other claimants of the same right in the same alley. The bill further states, that the flowing of the waters from the complainant's building and lot has been so far from producing any nuisance in the said alley, that it has produced no material inconvenience to any person; that the water has lately flowed, as it did for years before, consisting almost wholly of rain water, and free from impurities in a far greater degree than is usual in such cases. That, independently of the water which has flowed from the complainant's said house and lot, until interrupted as aforesaid, the water from the house and lot of *Bosley*, and from the other lots upon the said alley, has always flowed, and still does flow, through the same, to all which the addition of the water from the complainant's lot, could be of no great importance, or make a nuisance where there was none before, and that even before the said lots were sold, and built upon, the ground of the said alley, and the contiguous ground was, as the complainant believes, the conduit of the water from his lot to the Falls. That the obstruction of the course of the said water, by *Bosley*, is, and will continue to be, a serious mischief to the complainant, who has no other outlet for the said water, and has already been compelled, by the said obstruction, to sink wells in the yard to receive the rain water, which otherwise would flow into his cellars, and be greatly injurious to his property, and the health of his family, and from those wells, it would be necessary, if much water should accumulate in them, to convey it by buckets, or some such inconvenient mode, into the street, and through his house; and if the accumulation should be rapid, even that would be ineffectual. That before the making of the last mentioned obstruction, he had offered to *Bosley* to refer the dispute, which his former attempt to prevent the flowing of the water from the complainant's house and lot through the said alley had produced between them, to the decision of any three intelligent persons, either lawyers, or others, and the complainant was induced to suppose that this overture would be accepted; but it soon appeared that *Bosley* was bent upon asserting his fancied right, and would listen to no proposals having friendly adjustment for their object. That the complainant endeavoured, at the time of the making of the said last mentioned obstruction, to prevail upon *Bosley* to desist therefrom, and well hoped that he would have done so. But that he persists in his determination to obstruct the flowing of the said water as aforesaid, and threatens to continue to do so, although he has no right whatever to lay accumulations of stones, and gravel, and sand, upon the surface of the said alley, or other rubbish, in which he has not any property whatever, nor even a right of way but by an indulgent interpretation of his title papers, if indeed he has any such right, which the complainant does not admit. *Prayer*, that *Bosley*, *S.* and *W. Farnandis*, and *Biscoe*, may true and perfect answers make to the several matters and things in this bill of complaint contained, and that *Bosley*, his agents and servants, may be enjoined to remove the said obstruction, or suffer the complainant to cause it to be removed, and to forbear any attempt to renew the same, or to make any other obstruction to the flowing of the said water as aforesaid, until the further order of this court; and that the complainant may, by the decree of this court, be quieted in the enjoyment of the said alley, as alienee and assignee of *Myers*, and owner of the house and lot to which the use and privilege thereof are appendant, and his title thereto maintained; and that he may have such other and further relief, as the nature of his case, and equity and good conscience require.

Exhibit A. Is a plot by which Mrs. *Lawson* sold the property.


J. Wilson's
J. Carrere's
Holliday
No. 1, J. M'Kim's
No. 13,
No. 2, Bosley's
No. 3, Bosley's
No. 4, Bosley's
Conveyed to B by W & S F
No. 5, S & W Farnandis.
10 Feet Alley.
No. 14, Bosley's
10 feet Alley
No. 15, Bosley's
Street formerly Back street
North now Belvidere-street

Exhibits B, C, D. The depositions of witnesses as to the manner and terms of sale to *Myers*.

Exhibit E. The deed from *E. Lawson* to *Myers*, dated the 16th of December 1811, conveying to him and his heirs, "all that piece or parcel of ground situate in the city of *Baltimore*, beginning on the west side of *Holliday-street*, at the distance of 319 feet northerly from the intersection of the N W corner of *East* and *Holliday-streets*, thence running easterly, parallel with *East-street*, and binding on the north end of *Holliday-street*, 35 feet to *Back-street* or *Holliday-street* united, thence N binding on *Back-street* or *Holliday-street* united, 31 feet to lot No. 2, purchased by Mr. *James Bosley*, thence W parallel with *East-street*, and binding on lot No. 2, running 187 feet to *North-street*, thence S binding on *North-street* 31 feet, thence E with a straight line to the beginning, with the privilege of an outlet through a ten feet alley at the back of lot No. 2."

Exhibit F. The deed between *Bosley*, *S.* & *W. Farnandis* and *Myers*, dated the 1st of July 1815, reciting the deed from Mrs. *Lawson* to *Myers;* her deeds to *Bosley*, and her deed to *S.* & *W. Farnandis*, and the deed from *S.* & *W. Farnandis* to *Bosley*, for part of the lot conveyed to them by Mrs. *Lawson;* also referring to a plot exhibited at the sale of the lots by Mrs. *Lawson*, delineating two lanes or alleys each of the width of ten feet, the one of them extending nearly N and S parallel with *Holliday* and *North-streets*, and at the distance of 100 feet easterly from the latter, passing through the whole extent of Mrs. *Lawson's* ground, to wit, from the northermost line of the ground conveyed to *S.* & *W. Farnandis*, to the southern extremity or limits of, and passing through the ground conveyed to M*yers;* and the other one of the said alleys extending from *North-street* at right angles, easterly, and between the two parcels of ground fronting on the E side of *North-street*, conveyed to B*osley*, to intersect the alley running parallel with *Holliday* and *North-streets*, which said lanes or alleys were, at the time of the said sale, declared to be for the use and benefit of the purchasers of the ground, then offered for sale, and the remaining ground of Mrs. *Lawson*. Also reciting, that M*yers* had improved and built upon that portion of the alley extending from N to S, to wit, the S end of said alley, and which is comprised in the description set forth in the deed to him; "and in consideration of his agreeing to relinquish all right to the use of the residue of that alley, and the whole of the alley running from *North-street* as aforesaid, they the said B*osley* and *Samuel*, and *Walter Farnandis*, have severally and respectively agreed to release to the said *Myers*, all their right and title to that portion of the said alley so as aforesaid improved and built upon by him." The said B*osley* and *S. & W. Farnandis* did thereby, in consideration of the premises, and in consideration of one dollar a piece to them paid by M*yers*, bargain, sell, surrender, and forever release, to M*yers*, his heirs and assigns, "all the right, title, interest and claim whatever, of the said B*osley* and *S.* and *W. Farnandis*, of, in and unto, all that portion of the aforementioned alley, comprised within the limits of the conveyance to the said M*yers*, and which hath been so as aforesaid improved and built upon by him; to have and to hold," &c. And the said M*yers* did thereby, in consideration of the premises, and of one dollar, &c. bargain, sell, surrender, and forever release, unto the said B*osley* and *S.* and *W. Farnandis*, their heirs and assigns, "all the right, title, claim and interest whatsoever, of the said M*yers* of, in and unto, the two several alleys before mentioned, and the use of them respectively, except that portion of the one of them so as aforesaid improved and built upon by him. To have and to hold," &c. The *injunction* prayed by the bill was granted accordingly.

The *answer* of the appellant, (one of the defendants below,) denies the plot exhibited by the appellee to be correct, as the alley does not run in it through the whole length of the ranges of lots. He denies the understanding, that *Myers* should take in the alley in his ground. He refers to the depositions of *Young* and *Myers*, accompanying his answer, to show that there was no such understanding. He asserts that the lots of *Myers* sold at a higher price than others, not on account of taking in the alley, but because of their larger front on *Holliday-street*, and being higher and better ground for building—some of the other lots requiring piling in order to build. He believes that the alley between *Myers's* lots would prove a convenience in various ways. He avers that the conveyance to *Myers*, including the alley, was a fraud on the purchasers of the other lots; and he refers to Mrs. *Lawson's* bond of conveyance to *Myers*, given before her deed to him, in which the part of the alley is not agreed to be conveyed. He insists on his right of way by Mrs. *Lawson's* deeds to him. He denies that he suffered *Myers* to build across the alley, except on condition of his leaving an opening underneath that might be closed with gates. That *Myers* built over the alley, and the discharge from his lots became offensive; that *Myers* then showed for the first time, to the appellant, Mrs. *Lawson's* deed, which surprised him; that *Myers* then, without being alarmed or threatened by the appellant, made the exchange of his right of way for the secure right of building over the alley. He denies that he agreed to let the water run from *Myers's* property through the alley, longer than the time necessary for *Myers* to raise the yard of his house, so as to let it off into *Holliday-street;* and provided too, that it did not become a nuisance, in which event it was to be shut up at the appellant's discretion. That the appellee has a better outlet for the water through *Belvidere-street*, and that the appellee admitted that fact before filing the bill. That the filth, &c. in the alley from the appellee's house, became offensive to the appellant's tenants. That they complained, and after sending letters to the appellee, &c. the appellant attempted to stop his use of the alley. That the water, &c was not discharged in the appellee's time as it was while *Myers* was owner. That *Myers* had it to flow through a gate, by which means the outlet, &c. could be cleaned; but it was not so with the appellee's arrangements. That in the fall of 1821 the appellee built up the whole width of the alley, and had no outlet, except through a hole in the wall, and requested the appellant to permit the water to run down the alley until he could lay pipes to carry it into *Holliday-street*. That when the appellee's work was done, the appellant requested him to stop the hole; but he would not—thence the obstructions by the appellant, &c. He avers that the flowing of the water, &c. from the appellee's property, was a great nuisance.

Among the several exhibits of the appellant, accompanying his answer, is the deed from *Myers* to the appellee, dated the 7th of November 1816, reciting the deed from Mrs. *Lawson* to *Myers;* and in consideration of $18,000, *Myers* conveyed to *M'Kim.* (the appellee,) and his heirs, all that piece or parcel of ground which was conveyed by Mrs. *Lawson* to *Myers*, by the said recited deed; "subject, however, to a contract between *James Bosley*, and *Samuel* and *Walter Farnandis*, and the said *Myers*, dated the 1st of July 1815. To have and to hold," &c. "subject as aforesaid to the contract respecting said alley or outlet," &c.

The *answer* of *James Biscoe*, (one other of the defendants,) a purchaser from *S.* and *W. Farnandis*, is not material, he having no knowledge of the facts.

The *answer* of *S.* and *W. Farnandis*, (other defendants.) They deny the correctness of the plot exhibited by the appellee. They assert that the alley in the true plan run through the whole property. They deny that there was any understanding as to taking in the alley. They state, as *Bosley* does, why *Myers's* lots sold highest. They deny that the deed with *Myers* as to the alley, &c. was obtained by threats, &c. but that it was executed by him deliberately, and with full knowledge. They deny the pencil marks on the plot, &c.

The motion to dissolve the injunction was overruled by the county court, and the injunction continued. Testimony was taken under an agreement of the parties; and a *pro forma* decree passed by the county court making the injunction perpetual. From that decree *Bosley*, one of the defendants below, appealed to this court.

The cause was argued at December term 1825, before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J.

Speed, for the Appellant, contended, 1. That the deed between *Bosley* and *Farnandis* and *Myers*, by which *Myers* renounced his right to the alley, binds *M'Kim*, and bars his claim to the use of the alley.

2. That the said deed was fairly obtained from *Myers*, and for an adequate consideration.

3. That *M'Kim* cannot impeach the said deed for fraud or want of consideration.

4. That the court has no jurisdiction in this case.

A compromise of a doubtful right, where no advantage is taken, is a valid consideration. 1 *Pow. on Cont.* 363. *Cory vs. Cory*, 1 *Ves.* 19. *Cann vs. Cann*, 1 *P. Wms.* 724. *Stapilton vs. Stapilton*, 1 *Atk.* 10. *Taylour vs. Rochford*, 2 *Ves.* 284. *Gibbons vs. Caunt*, 4 *Ves.* 849. *Pullen vs. Ready*, 2 *Atk.* 592. A right of way appendant, raised by *operation of law*, may be granted; though if raised by deed it cannot. 2 *Blk. Com.* 35. The covenants in the deed of compromise are sufficient to bind *Myers*, and all claiming under him, and among others, purchasers for valuable consideration with notice, and *M'Kim* had notice. *Finch vs. Earl of Winchelsea*, 1 *P. Wms.* 282. *Freemoult vs. Dedire*, *Ib.* 429. Equity will prevent a breach of a covenant. 1 *Madd. Chan.* 159, 162. 1 *Fonbl.* 345, 346. The privy cannot deny the force of the covenant. *Taylor vs. Stibbart*, 2 *Ves. jr.* 437. A grant will be construed a covenant. *Curtis vs. Perry*, 6 *Ves.* 745. The deed operated as an agreement in the recitals. The agreement is evidenced by the deed, and binds the parties. 1 *Pow. on Cont.* 313, to 316. *Cannell vs. Buckle*, 2 *P. Wms.* 243. The deed operates as an estoppel on the privies of *Myers*, both as respects its validity and its effect. *Litt. s.* 58. *Co. Litt.* 352. *Rawlins'* case, 4 *Coke*, 53, 56. *Ferrer's* case, 6 *Coke*, 7. *Blake's* case, *Ib.* 44. *Winchester's* case, 3 *Coke*, 3. The court has no jurisdiction of the case—a bill will not lie in a case like this. 1 *Madd. Chan.* 171, 172. 1 *Harr. Chan.* 124, 125. *Lord Tenham vs. Herbert*, 2 *Atk.* 483. *Witchurck vs. Hide, Ib.* 391. *Cowper vs. Clerk*, 3 *P. Wms.* 156. *Weller vs. Smeaton*, 1 *Bro. Ch. Rep.* 573.

Mayer, on the same side. The appellee is the complainant, and comes into court claiming equity—To set aside a solemn conveyance entered into by his grantor, of which he had full knowledge. An alley means a right of way. The condition of sale was, that the alley was to go through the whole extent of Mrs. *Lawson's* property then offered for sale. No verbal declarations at a sale can control the printed conditions of sale. *Sugd.* 22, 23. *Powell vs. Edmunds*, 12 *East*, 6. The bill alleges that the alley is the natural course of the water. The natural course of the water only existed while the ground remained in its natural state. The owner of the soil may change the course of the water, or prevent it from flowing at all, by filling up the water course. Parol evidence is admissible to prove, by the penman of the deed, that something was omitted or inserted by mistake or by fraud. 1 *Pow. on Cont.* 432. Mistake in law is no ground for *assumpsit;* but a mistake in fact is. The deed of compromise put an end to all rights of the parties. This is not a right of way. *Co. Litt.* 120. It is only appertenant and grantable. *Bro. Ab.* tit. *Grant*, pl. 130. 2 *Roll. Ab.* 46. Whether grantable or not, it is not said it may not be severed. A man may exclude himself from the enjoyment of a right of way. A right of way is not considered an interest, but an easement, and is not similar to a right of common. *Anon.* 3 *Salk.* 40. *Godley vs. Frith, Yelv.* 159. *Liford's* case, 11 *Coke*, 47. A highway may be granted. *Bro. Ab.* tit. *Common*, pl. 27, 28. It is contended that the deed vests no right in *Bosley*, but it is to exclude *Myers* from the use of the easement—to bar him of the community of benefit. *Jacobson vs. Fountain*, 2 *Johns. Rep.* 176, Per *Thompson*, J. The party might, though he could not, grant the right, covenant to bar himself from the benefit of it, or not to exercise it. Though the right to exercise a trade is not grantable, yet the party may covenant not to exercise it. 2 *Bac. Ab.* tit. *Cove-*

nant, (B) 65. A *chose in action* is not assignable, yet the assignment of it is a covenant. *Deering vs. Farrington*, 1 *Mod.* 113. Issue in tail cannot release his right to disseissor, but he may bind himself by warranty. *Litt. s.* 446. *Mason vs. Muncaster*, 9 *Wheat.* 445. *Eden on Injn.* 223. *Co. Litt.* 223, b. The appellant need not rely on the deed of compromise as a grant, but as a covenant not to exercise a right to which M'*Kim* is bound, coming in as he does, under the covenantor. It operates as covenant to stand seized to uses. *Rigden vs. Vallier*, 2 *Ves.* 255. *Thompson vs. Attfield*, 1 *Vern.* 40. *Crossing vs. Sudamore*, 1 *Vent.* 137. *Smith vs. Packhurst*, 3 *Atk.* 135. *Bagshaw vs. Spencer*, 2 *Atk.* 570. *Mosley vs. Mosley*, 5 *Ves. jr.* 248. The word *grant*, even at common law, amounts to a covenant. *Pomfret vs. Ricroff*, 1 *Saund.* 321, 322. Yielding and paying rent amounts to a covenant. *Bac. Ab.* tit. *Covenant*, (B) 65. Bargain and sale is a covenant to convey and to do all it purports to do. 2 *Fonbl.* 46. *Mestaer vs. Gillespie*, 11 *Ves.* 625. Bargain and sale, though not enrolled, may be effectuated in chancery as a covenant. *Williams vs. Mayor, &c. of Annapolis*, 6 *Harr. & Johns.* 529. The words in the deed of compromise import a covenant; but if they do not, yet there is enough in the recital in the deed to exclude *Myers* from the right of way. The covenant in the deed, at all events, compelled M*yers* to relinquish the right of way to Mrs. *Lawson*. Before complainant can claim equity of the defendant, he must do equity. The covenant must be fulfilled. The deed from M*yers* to M'*Kim*, bound the latter to release to Mrs. *Lawson* the right of way, if it could not be done in any other mode. The bargain for the property, and directions to the writer of the deed, are to be considered as a part of the deed. A recital of this kind is a covenant. *Hollis vs. Carr*, 2 *Freem.* 3. S. C. 2 M*od.* 89, 91. This case is sanctioned in *Saltoun vs. Houstoun*, 1 *Bingham*, 433, (8 *Serg. & Lowb.* 398.) *Severn vs. Clark*, 2 *Leon.* 122. *Graves vs. White*, 2 *Freem.* 57. If it be said to be merely a personal covenant so as to bind M*yers* and not his assignee, the answer is, if any interest was vested in *Bosley* it must bind the assignee. The covenant must embrace not only M*yers*, but his assigns. There is a covenant in the deed that attends the land, (2 *Bac. Ab.* tit. *Covenant*, 65,) which binds the assigns, though they be not named. If not at common law, it does in equity. 1 *Fonbl.* 253, 354, 355. M'*Kim* has no right to claim the advantage of his having his building over the alley, unless he relinquishes his right to the benefits of the right of way to the alley from his lot. Equity will not permit him to enjoy the one, without his relinquishing the other. It will be said that the deed to M'*Kim* refers to the deed of compromise, according to its legal operation. It does more, it shows that he is only to enjoy under his deed on the sole condition of respecting the deed of compromise. The deed of compromise is an indenture, and will operate by way of estoppel. Equity follows the law no further than to lead to an honest and virtuous decision. To do that it will enforce the doctrine of estoppel. In a case of private nuisance, such as this is, chancery has no jurisdiction to grant more than a temporary injunction to abide a suit at law. So when the title is at all questioned. *Van Bergen vs. Van Bergen*, 2 *Johns. Chan. Rep.* 272. *Gardner vs. Village of Newburgh, Ib.* 164. *Van Bergen vs. Van Bergen*, 3 *Johns. Chan. Rep.* 282. *Corning vs. Lowerre*, 6 *Johns. Chan. Rep.* 439. *Storm vs. Mann*, 4 *Johns. Chan. Rep.* 21. *Pillsworth vs. Hopton*, 6 *Ves.* 51. *Davis vs. Leo, Ib.* 784. *Hanson vs. Gardner*, 7 *Ves.* 308. *Stevens vs. Beekman*, 1 *Johns. Ch. Rep.* 318. *Cooper's Plead.* 159. *Birch vs. Holt*, 3 *Atk.* 726.

R. Johnson, on the same side, referred (on the question of jurisdiction,) to *Norway vs. Rowe*, 19 *Ves.* 147; and as to the effect of the recital in the deed of compromise, to *The Parishes of Caister and Eccles*, 1 *Ld. Raym.* 683.

Marriott, for the Appellee. The deed of compromise was founded on mistake and fraud, and parol evidence is admissible to prove the mistake or fraud. This case is to be considered in the same manner as if the original parties were now before the court—as if the contest was between M'*Kim* and M*yers*. *Ardglass vs. Muschamp*, 1 *Vern.* 237. *Englefield vs. Englefield, Ibid* 443. *Chesterfield vs. Janssen*, 2 *Ves.* 152, 155, 157. S. C. 1 *Atk.* 354. *Hobart vs. Galley*, 2 *Atk.* 34; and *Hawse vs. Wyatt*, 3 *Bro. Chan. Rep.* 156. The deed of compromise is wholly void both at law and in equity. The sole consideration of it, as regards *Myers*, was the reciprocal release of the *pretended* right to the alley. Cases in which instruments of this sort have been set aside on the ground of fraud or mistake take. *Masan vs. Armstrong*, 13 *Ves.* 25. *Gee vs. Spencer*, 18 *Vin. Ab.* 370, cites 1 *Vern.* 32. *Lucas vs. Adams, Ib. Broderick vs. Broderick*, 1 *P. Wms.* 239. *Murray vs. Palmer*, 2 *Sch. & Lef.* 474. *Evans vs. Llewellen*, 2 *Bro. C. Rep.* 150. 2 *Pow. on Cont.* 196. *Lansdown vs. Lansdown, Mosely*, 364. This last case, sanctioned in *Hunt vs. Rousmanier*, 8 *Wheat.* 214; and in *Lammot vs. Bowly*, 6 *Harr. & Johns.* 500. 2 *Pow. on Cont.* 200. *Whorewood vs. Simpson*, 2 *Vern.* 185. In *Lammott vs. Bowly*, 6 *Harr. & Johns.* 500, a party contracting under a clear mistake of his legal rights will be relieved in equity. Fraud may be inferred from facts and circumstances, &c. *Watkins vs. Stockett, Ib.* 435. A written agreement rectified on proof of fraud or mistake, &c. *Wesley vs. Thomas, Ib.* 24. By the agreement between *Bosley* and *Myers*, the former released his right, if any he had, to the alley, to the latter, by parol agreement, before the deed from *Lawson* te *Myers*, for a valid consideration. The answer admits the agreement. It is executed, and will be established; so decided in *Jones vs. Slubey*, 5 *Harr. & Johns.* 372. Suppose the deed of compromise legally and fairly executed, what is its legal effect and operation? It is said it will operate as a grant—as a release—as an extinguishment. That it created a covenant on the part of *Myers*. There are no words in the deed constituting a covenant. It was intended, if at all, as a grant or release. A deed intended to operate in a particular manner, if it fail so to operate, cannot operate in any other way. *Shep. Touch.* 82. This deed was intended to be effective as a grant or release, and, therefore, cannot operate as a covenant to stand seized. *Myers* had no right to grant the right of way; and if his deed was legally executed, it did not pass the right to *Bosley*. He could only release to Mrs. *Lawson*. As to the different kinds of rights of ways—See 1 *Thomas's Coke Litt.* 234, *(note* D.) This is the case of a way appendant to an estate. Can such a way be granted? The right of *Myers* to use the alley was appendant to his use of lots No. 1 and 13. He cited *Fitz. Ab.* tit. *Grant*, 47, pl, 38. *Bro. Ab.*

tit. *Grant*, pl. 130. *Nevil's* case, 1 *Plow.* 381. *Shep. Touch.* 240. 14 *Vin. Ab.* tit. *Grant*, (F) 45. To show that the right was not extinguished, he cited 2 *Coke Litt. (Thomas's,)* 372, *(note* R.) *Ib.* 557, *(note* K.) 11 *Vin. Ab.* tit. *Extinguishment*, (C) 449. It could not be extinguished without the consent of Mrs. *Lawson*, and of all others entitled to the benefit of the right of way. But it is said that as *Bosley* and *Furnandis* had a right of way in the same alley, they were capable of taking a release from M*yers*. They had, however, no right in the soil, but only title to the way in common with other holders of the lots on the alley. The civil law agrees with the common law in this particular. 1 *Domat Civil Law*, 196. Definition of a service, *Ibid* 199. Services being annexed to lands, and not to persons, cannot pass unless the land passes also. *Ibid* 204. The service ceases on the master of the land becoming the owner of both.

Wirt, (Attorney-General of *U. S.)* on the same side. The injunction in this case is against the obstruction of the passage of the water from the house and lot of *M'Kim*, through the common alley left for the use of all the holders. How does *Bosley* claim the right to create this obstruction? He says, under the deed of 1815, the deed of compromise. That deed is void.

1. It is void because it was obtained under circumstances which render it so. Look at the posture of the parties, and of their relative rights, when the deed was entered into. What were the rights acquired at the sale? He here went into an examination of the evidence, to show that it was understood at the sale that the purchaser of lots 1 and 13 was to have the intervening alley itself. Though M*yers* may not have heard the terms of sale, he could take advantage of them. The bond of conveyance to M*yers* shows that he acquired higher and different rights from those of the other purchasers. What rights did *Bosley* acquire to the alley? He acquired none. It was an outlet and way, and was so represented at the time of the sale. But suppose *Bosley* acquired a right to the alley at the sale, and M*yers* did not—How stands the contract when M*yers* built his house? There was then a parol agreement be-

tween *Myers* and *Bosley*, that *Myers* might build on the alley, and that agreement was executed. *Bosley's* answer admits the agreement. *Fowkes vs. Joyce*, 2 *Vern.* 129. But it is said that this parol agreement did not affect *Farnandis*. He stood by and saw the building going on, and made no objection to it. He is, therefore, to be presumed to have assented to it. 1 *Madd. Chan.* 263, 264, (and *note.*) After this the right of *Myers* was complete. *Bosley's* rights were gone by his consent. Five years afterwards *Bosley* complained, and walled up the alley—admitted he had no right to do so, but said that if *Myers* claimed a right to that part of it below his house, that those below had right to the alley above, and perhaps a part of *Myers's* house must come down. *Bosley* proposed an arrangement, which *Myers* agreed to, doubting his right to the alley, and not willing to enter into a law suit. Is an agreement entered into under such circumstances to be enforced or respected? We have seen what were *Myers's* rights—moral coercion by one, and mistake by the other. No consideration for the agreement. There is no reciprocity in the deed of compromise. *Bosley* and *Farnandis* only pretend to grant the soil. *Myers* conveys the *use* to the alley. Will the deed be respected as a deed of compromise of doubtful rights? If of rights, of which the party did not know, it is not a valid deed. *Cann vs. Cann*, 1 *P. Wms.* 724. In *Lammott vs. Bowly*, 6 *Harr. & Johns.* 500, it was decided that ignorance of legal rights will not preclude the party from recovering against an agreement entered into by him under such ignorance.

Can M'*Kim* make the objection to the validity of the deed of compromise if it be void in law, he having purchased with a knowledge of the deed? He purchased subject to that deed; and if the deed was void, it cannot affect him, and he can object to it. The validity of the deed must depend upon the deed itself, and cannot be aided by M'*Kim's* knowledge of its existence. Suppose a purchase made with a knowledge of mortgages, some of which were obtained by fraud, usury, &c. can not the purchaser object to their validity? M'*Kim* was placed in *Myers's* situation, and if *Myers* could object, so may M'*Kim*. But it is said that this deed was subsequently affirmed by the deed from *Myers* to M'*Kim*, so as to render the first valid.

This, however, is not so, for confirmation upon confirmation will not aid such a deed. *Ardglass vs. Muschamp*, already cited, is full to that point. *Rook vs. O'Brien*, 1 *Ball & Beatty*, 357, was a case of ratification upon ratification, and yet 30 years afterwards the deed, so ratified, was successfully impeached.

2. The *second* objection to this deed is, that at law it is void. Its mere legal operation is on a right of way on a particular piece of land. Is such a right the subject of a conveyance? A right of way appendant to land is an incorporeal hereditament. It does not vest in the proprietor—It stands connected with the land, and cannot be severed at all from the soil to which it belongs. A right of way appendant, connected with land, cannot be conveyed or granted, or severed from the land. This is the rule of both the common and the civil law. It may be extinguished by a deed to Mrs. *Lawson*, but to no one else. It was extinguished by her deed to *Myers*. One tenant in common cannot release to another. 2 *Thomas's Coke Litt.* 551, (*note* a.) A party is never estopped from denying the legal existence of his deed. A deed of bargain and sale not recorded, may operate as a covenant, by reason of the payment of money. The recital in the deed of compromise is to relinquish that to which he had no right, and he goes on so to relinquish in the deed itself, which is a nullity. It is therefore, not a recital which will amount to a covenant. If it is a covenant, it binds *Myers* personally; for it does not profess to bind his heirs and assigns. The deed conveys nothing to him from the other parties to it, for they had nothing to convey.

3. Does the deed of compromise convey the subject? Suppose it did, what was *Bosley's* remedy? Not to put up the wall he erected, but to institute his action to recover damages. But the instrument in no part of it acts upon the passage of the water in its natural course, but upon a right of passage of man, horse, &c. through the outlet. The deed professes to convey mutual rights. No right of passage for the water up the alley existed in fact, because none ever went or could go that way. They then could not convey that right. But the water went the other way, and this it is said, *Myers* conveyed. The right of passage of water is natural or conventional. Rain water is to

flow in its natural course, and cannot be obstructed. There is no such thing as a man's conveying the right of water to pass over the grounds of his neighbour. The deed will not be construed so as to control the laws of nature.

4. Admitting all the above grounds to be against us, still the parol contract by *Bosley*, that the water might pass until it should become a *nuisance*, is to be respected. Under that agreement it was used for 5 years by *Myers*. M'*Kim* succeeded to *Myers's* rights. Is the water that now passes a nuisance? Nothing passes but rain water—Is that a nuisance? It must be established as a nuisance before the right to its passage can be prohibited. The water, &c. from the kitchen, passes in another way. If a nuisance, the corporation could interfere and prohibit it. The rain water passing through would cleanse the lower part, into which the washings of the stables and offal of other kitchens collect.

As to the point of jurisdiction. It has not been stated whether the jurisdiction is denied to award the injunction, or to perpetuate it. The decree was *pro forma*, by consent, and there is nothing to prevent this court from acting on the case. No objection was taken below to the jurisdiction. If the court could award the injunction, and send an issue to a court at law afterwards for trial, their not doing so cannot be complained of by either party, because they were prevented from doing so by the *pro forma* decree. The decree is to vacate a deed obtained by fraud, and until that was done, there could be no case at law. A court of law may in some cases examine into fraud; but if it can, so may equity more fully. There is no case showing that a court of equity cannot stop a nuisance. This is an obstruction which would be prejudicial to *M'Kim's* property, and the health of his family, or run him to considerable expense before the question could be tried at law. Where a court of equity has refused to interfere, it has been where the party complaining has acquiesced for years; or the trespass has been done and passed, and the object is only to prevent a repetition of it. *Van Bergen vs. Van Bergen*, 2 *Johns. Chan. Rep.* 272. S. C. 3 *Johns. Chan. Rep.* 282. *Corning vs. Lowerre*, 6 *Johns. Chan. Rep.* 439. *Storm vs. Mann*, 4 *Johns. Chan. Rep.* 21. *Hanson vs. Gardiner*, 7 *Ves.*

308. *Stevens vs. Beekman*, 1 *Johns. Chan. Rep.* 318. This last was a mere ordinary case of trespass.

R. Johnson, in reply. 1. Upon the question of jurisdiction. Whether the court had jurisdiction to issue the injunction, is not the question; but whether an issue ought not to have been sent to a court of law to be tried; and whether a perpetual injunction ought to have been decreed before such an issue was tried at law?

[Buchanan, Ch. J. This court think the court below were not precluded from going on to perpetuate the injunction, or to dissolve it, without sending an issue to a court of law.]

This being the opinion of the court, the next question is, whether the injunction ought to have been perpetuated, under the circumstances of this case, admitting that there was no necessity to send an issue to be tried at law? The fraud charged in the bill gave jurisdiction; but though it is stated that the deed of 1815 was obtained by fraud, yet the court were not asked by the bill to set aside that deed. So far as that deed conferred rights on M'*Kim*, he had no objection to its standing as valid. The nuisance charged too, was stated to be of an irreparable injury. The answer denies that the nuisance is irreparable. There is no proof that it is of that character. It is in proof that pipes laid in the cellar conduct the water from the kitchen, (which is on a level with the yard,) into *Holliday-street*. If that is the case why cannot the rain be conducted the same way? All the equity in the bill is denied in the answer, and so is the irreparable injury, and there is no proof contradicting, in these particulars, the answer. That being the case, what are the authorities on the subject *Van Bergen vs. Van* Bergen, 3 *Johns. Chan. Rep.* 282. The right interfered with must be a long previous *right*—not a *permission* It must be a strong case of pressing necessity, or established at law, to induce equity to interfere by injunction. *Brown's* case, 2 *Ves.* 414. The right must be first established by a trial at law. *Storm vs.* M*ann*, 4 *Johns. Chan. Rep.* 21. Where the title is disputed, an injunction will not be granted to stay waste. *Gardner vs. Village of Newburch*, 2 *Johns. Chan. Rep.* 165. *Attorney General vs.*

Utica Insurance Company, Ibid 379. *Reid vs. Gifford,* 6 *Johns. Chan. Rep.* 19. *Norway vs. Rowe,* 19 *Ves.* 147. There can be no injunction for waste where the title is disputed by the answer. *Eden on Injn.* 168. Another ground, stated in the bill, for the exercise of this summary power by the court, is that it will prevent the multiplicity of suits. *Cooper's Plead.* 159, and the cases there cited. These cases show, that a perpetual injunction ought not to have been decreed.

2. As to the effect of the deed of 1815. It is said that that deed was obtained by fraud or mistake. In the first place there is no proof that *Myers* purchased the intervening alley between 1 and 13. If the alley was sold so as to consolidate lots No. 1 and 13, why not also consolidate No. 2 and 14, and all the rest of the lots?

3. It is said a right of way appendant cannot be conveyed in gross. This is not denied. Here it has not been done. The conveyance here is not to a stranger. The use of the alley was given to all the holders of lots on the alley. *Bosley* does not hold a right of way in gross, in the alley, under the deed from *Myers* in 1815. Where persons have a right of way jointly, there is no authority to show that one of them cannot transfer his right to the others. Such a transfer is only an enlargement of the right of way in the rest. But it is not a right of way strictly speaking, it is an easement. *Godley vs. Frith, Yelv.* 159. *Anon.* 3 *Salk.* 40. The deed is a covenant not to use the way. *Hollis vs. Carr,* 2 *Freeman,* 3, sanctioned by S. C. 2 *Mod.* 89. *Saltoun vs. Houston,* 1 *Bigham,* 433, *(*8 *Serg. & Lowb.* 368.*)* An agreement to do an act amounts to a covenant to do it; a recital amounts to a covenant. A court of equity would enforce a specific execution of the agreement against *Myers,* if *Bosley* and *Farnandis* had filed a bill against him. *The Parish of Caister vs. The Parish of Eccles,* 1 *Ld. Raym.* 683. *Jacobson vs. Fountain,* 2 *Johns. Rep.* 176, per *Thompson,* J. But it is said to be a personal covenant, and not to bind *M'Kim.* This would put it in the power of *M'Kim* to perpetrate a fraud on *Myers*; for in *Myers's* deed to *M'Kim* it is expressly stipulated that the alley was not to be used by *M'Kim.* *Myers* intended to guard against his responsibility to *Bosley* and *Farnandis,* by putting

the exception of the right of way in his deed to *M'Kim*. *M'Kim* agreed so to hold the lot. If *Bosley* and *Farnandis* could recover of *Myers*, *Myers* could recover of *M'Kim*. But it is said if the deed of 1815 be a valid deed, *Bosley* has no right to obstruct the right of way. What then? The question here is, has *M'Kim* a right to complain? If he has a right, any other person had a right to complain. This is the first time a court of equity was ever called upon to relieve a man against his own covenant.

Taney, also in reply. The alley in dispute here is a private one to a few individuals, and the rights to it were acquired by contract, and depend solely upon contract. It was laid out for a way, and outlet and passage for the water, by the original proprietor of the ground. The lots are entitled to the alley as an easement. For that purpose the plot, by which they were sold, so represented it. Mrs. *Lawson* contracted that it should be a way and passage, as well as a way for water. M'*Kim* must show himself entitled to the easement he claims, and that such title is opposed by *Bosley*. If he has no interest, and no right to the drain of water he claims, he cannot call upon this court to aid him in relation to it. A stranger in interest cannot claim the interposition of the court of chancery. *M'Kim* being a purchaser with notice, is bound to the same extent that *Myers* was bound. He knew of the agreement between *Myers*, *Bosley* and *Farnandis*. *Sugd.* 526.

1. Was *Myers* entitled to the relief at the time he sold to *M'Kim?*

2. If *Myers* was entitled, is *M'Kim* entitled under his contract with *Myers?*

1. The agreement of *Myers* in 1815 extingnished all right which *Myers* had. But it is said it was obtained by fraud, and without consideration; and that independent of the agreement itself, there is evidence of the fraud. Can parol evidence contradict the plot by which the property was sold? The exhibition of the plot at the sale makes the plot as binding on the parties as would be written terms of sale, and they cannot go out of the plot to prove that the lots were not sold according to the plot. *Sugd.* 22, 23. Here *M'Kim* claims a contract of sale

of the alley, and a specific execution of it. It is said there was a pencil-mark made on the plot at the sale, connecting lots 1 and 13, so as to make them one lot. The great bulk of the evidence is that there was no such mark. *Myers's* own testimony is that it was not there, and he purchased without hearing that the two lots were to be connected so as to take in the alley. If *Myers* acquired no right at the sale, then there was no fraud in *Bosley* in stating to him that he had no right to build over the alley. But it is said *Myers* obtained the right under a verbal contract with *Bosley.* That contract was but a license to build over the alley, and on a part of it, but not on the whole, and to leave an opening by a gate. A license to occupy a part is not a license as to the whole. A license is always revocable. *Myers* acquired a right as against *Bosley* to seven feet to the alley. How then did he acquire a right to the other part? The remaining part to the alley remained as it did at the sale. But as to *Farnandis* there was no consent. When a party, with a full knowledge of his rights, makes a contract, there can be no fraud in a man in contracting with him. There being a nuisance caused by *Myers*, *Bosley* had a right peaceably to prevent it. If any force or violence was used, it was by *Myers* in pulling down or preventing the obstruction of the nuisance. It could not be menace or duress, it is personal fear. Duress and fraud act differently. To make it fraud *Bosley* must have insisted upon a title which he had not. But suppose *Bosley* had no right to the alley, but believed he had a right of way between No. 1 and 13, there can be no fraud in his asserting the right. There can be no fraud unless his knowledge that he had no right, is brought to him, and that he intended a fraud on *Myers.* *Myers* was not deceived by any thing coming from *Bosley.* He acted upon his own knowledge. Was *Bosley* wrong? Learned counsel would have advised *Myers* to do what he did. Was the title of *Myers's* rights secured against *Bosley* and *Farnandis?* It was not a secure title, and he was right in making the contract with *Bosley* and *Farnandis.* *Myers* was not mistaken in the facts. Was he mistaken as to the law? Ignorance of the law is never presumed. It must be proved, and there is no evidence to show, that *Myers* was ignorant of his rights. The deed of 1815 operated as an extinguishment. If the deed did not operate to pass the right in gross, it can operate to extinguish, and M*yers* is estopped from saying it did not operate to extinguish his right. 1 *Thomas's Coke Litt.* 328. As to recitals being agreements—1 *Pow. on Cont.* 236, 238, cites *Greaves vs. White*, 2 *Freem.* 57. Chancery would enforce the agreement. But B*osley* is not here seeking to enforce it; it is M'*Kim* claiming under M*yers*, who is seeking to avoid it. The two parties stand very differently. Here M'*Kim* claims equity, without doing equity. If the recital is to operate as a covenant, there is an end of the case. But the granting part will operate as a covenant, (if it will not operate as a grant,) that he will not use the right of way, or any right on that part of the alley. It is like the case of *The Parish of Caister vs. The Parish of Eccles*, 1 *Ld. Raym.* 683, which was at law. The end the parties had in view is carried into effect. If the right itself could not be severed or extinguished, yet M*yers* could covenant not to use it. *Eden on Injn.* 223. If it is a covenant not to use the alley, then, the conclusion is irresistible, M'*Kim* cannot use the alley. What is M'*Kim's* equity? He has not shown that the deed was obtained by fraud, &c. He has no pretence of equity. He has shown none. Supposing the contract a valid one free from fraud, mistake, &c. his right to the alley, if any he had, was a voluntary gift of Mrs. *Lawson*, for which he paid nothing. M*yers*, at the time he sold to M'*Kim*, had no right, and M'*Kim*, purchasing with notice, cannot stand in a better situation than M*yers* would, and he is bound by it. Whatever is contracted to be done, is considered in equity as done. Nothing could pass to M'*Kim*, because all right and equity being out of M*yers*, he could not convey it to M'*Kim*. But it is said if M*yers* was bound, M'*Kim* is not, because the right followed the inheritance. That it run with the land, and could not be severed. *Taylor vs. Stibbert*, 2 *Ves. jr.* 437. Suppose an innocent mistake, and M'*Kim* purchased with a knowledge of the deed, he cannot set up the mistake. He does not stand here as M*yers*, would stand. He paid nothing, and purchased with the exception of the right of way. If his deed conveyed it to him, it is without consideration. M'*Kim* then has no right to come into equity, and claim relief from the mistake. The party himself, upon whom the mistake operated, might have been relieved against it, but not he who purchased with notice, and an acquiescence. *M'Kim* comes here as a mere volunteer—Will equity grant him what he asks? Parol evidence cannot be offered to contradict a written instrument, unless fraud, mistake or surprise, is alleged. *Westley vs. Thomas*, 6 *Harr. & Johns.* 24. The deed from *Myers* to M'*Kim* does except the right to the alley. Upon the true exposition of that deed, it does except the right of the alley or outlet. The intention of the parties is to be regarded. It cannot be subject to the agreement, unless controled by it; and it admits the agreement. It is a covenant on the part of *M'Kim*, barring him in a court of equity, and binding him to fulfil the agreement. It is said the claim of *M'Kim* is only to pass the rain water—a natural right which he claims the benefit of; that this natural right could not be passed away. Admit that it could not, yet there might be a covenant to give up and relinquish it. The bill does not charge that the alley was the natural course for the rain water. That fact was not put in issue. It is stated as a matter of belief, that the water did pass down the alley; but it is not charged that that was the natural conduit of the water. But admit the water to have gone naturally in that direction, could it by a mound be collected water, and pass in a current upon the adjoining property? If this eould be done in the country, yet it cannot in a city, where many rights must be and are surrendered. The right, therefore, of passing the rain water in a city is by contract, and there are no natural rights there upon the subject; artificial drains in a city are substituted for natural ones. M*yers's* right to pass the rain water was by contract, and was not a natural right; and being so, he could pass that right, or bar himself from using it. He has severed it by contract, as he well might, being held by him under contract. It is said there was a parol contract by *Bosley* to permit the water to flow until it became a nuisance, which was not reduced to writing at the time of the deed of 1815. Can parol evidence be admitted to prove a parol contract different from the written one? The bill does not allege any contract not stated in the written one, and that the written contract does not contain the sense of the parties. *Westley vs. Thomas*, 6 *Harr. & Johns.*

24. But there was no contract, but merely a *permission*. *Myers* proved that *Bosley* might stop the water when he pleased, and that there was no right to the alley or outlet. When it became a nuisance, the obstruction complained of was erected. So long as the water flowed through the gate nothing was said by *Bosley*. But the gate was taken away and the passage considerably narrowed. Then the nuisance became highly offensive. When so, *Bosley* interfered to prevent the water from passing that way. *M'Kim* does not claim the easement, as *Myers* did, but claims a greater privilege, and walls up the passage way, leaving a small hole for the water to pass through.

Curia adv. vult.

Stephen, J. at this term delivered the opinion of the Court. *Elizabeth Lawson*, being seized in fee simple of a parcel of ground lying in the city of *Baltimore*, caused the same to be divided into lots, and alleys for the benefit thereof, and a plot of the whole to be made, with a view to expose the same to sale, and on or about the first of December 1809, caused the said lots, or some of them, to be set up to public auction. At said sale *Jacob* Myers became the purchaser of the lots designated on said plot by the numbers one and thirteen. The bill charges that the said Myers purchased the said lots, with an understanding that the portion of the north and south ten feet alley, intervening between the said two lots, should be included in his purchase, and that he should have the same right and title to that as to the lots themselves. The bill further states, that at the said sale a certain *James Bosley* became the purchaser of lots number two and number fifteen; that a certain *John Small* became the purchaser of lots number three, four and fourteen; and that *Samuel* and *Walter Farnandis* became the purchasers in common of the lot number five; all of which last mentioned lots bounded on the north and south ten feet alley. The bill further charges that the said alley was designed for the accommodation of the purchasers of the lots bounding thereon, as a way or passage, and as an outlet for rain water, and other similar purposes, through the ground of the said *Elizabeth Lawson* down to *Jones's Falls*. In the spring of 1810, *Jacob Myers*, under an impression that he had purchased the intervening alley, as well as the adjacent lots, began to build on the lots purchased by him, and erected his buildings upon a part of the alley. After the completion of the buildings aforesaid, he resided several years in the same, until about the year 1815, when *Bosley* began to question the right of *Myers* so to cover with his buildings the said part of the said alley, and began to threaten to disturb him in the occupation thereof; and the bill charges that he insisted that he could make him pull down and take away such portion of his said buildings, or improvements, as were placed upon the alley, in virtue of a right in himself, and the said *Samuel* and *Walter Farnandis*, to the use of the said part of the said alley; it further states that *Myers*, becoming alarmed for his title to the said part of the said alley, and for his buildings thereon erected, was induced to doubt his own unquestionable rights, and being anxious to avoid a law suit, on the first of July in the year 1815, joined with the said *Bosley*, and *Samuel* and *Walter Farnandis*, in the execution of a deed, by which, in consideration that the said *Bosley* and *Farnandis* transferred to him, *Myers*, his heirs and assigns, all their right, title, interest and claim of, in and unto, all that portion of the said alley which had been built upon by him, he *Myers* transferred and relinquished to them, their heirs and assigns, all his right and title to the use of the alley, except the part built upon by him as above mentioned. On the seventh of November, in the year 1816, *Jacob Myers* conveyed to *John M'Kim* all his right and title to the property, so as aforesaid purchased by him at the sale of *Elizabeth Lawson*, subject, however, expressly to the contract so as aforesaid entered into by him with the said *Bosley* and *Farnandis*, bearing date on the first day of July, in the year 1815. Some time after the purchase of *M'Kim* from *Myers*, *Bosley* obstructed the passage of the water, from *M'Kim's* property, down the alley, relying for his authority so to do upon the said deed of the first of July 1815; and *M'Kim* filed a bill in chancery to compel the removal of the said obstruction, and to be quieted in the use and enjoyment of said alley, as alienee and assignee of the said *Myers*. The injunction prayed for was granted. *Bosley*, in his answer, denies that at the said sale, (which he states he attended from first to last,) there was any understanding that the purchaser of lots number *one* and *thirteen* should become entitled to the intervening alley. He also admits that he permitted *Myers* to build on a part of said alley upon certain terms; but denies that he ever intended to relinquish, or ever did relinquish, his right or title to the said intervening portion of said alley, except for an adequate consideration, or in other words unless *Myers* relinquished all his right and title to the residue of said alley. The bill charges that the deed of the first of July 1815, was unduly obtained by *Bosley*, by menaces and threats, operating upon the fears and timidity of M*yers*, and from a misapprehension, on the part of M*yers*, of his legal rights; all of which is denied by *Bosley* in his answer. On the 10th day of January, in the year 1824, *Baltimore* county court, in the exercise of its chancery jurisdiction, decreed the injunction, which had issued according to the complainant's prayer in his bill, to be perpetual. From this decree the respondent in the court below prayed an appeal to this court; and upon the merits and propriety of that decree this court are now called upon to pass their judgment. The first question which presents itself to the consideration of this court is, whether *Jacob* M*yers* can be considered as the purchaser of the intervening alley between lots numbered *one* and *thirteen*, as well as of the lots themselves? From the whole of the proofs, consisting of the acts of the parties, and the evidence, documentary and parol, this court are led to the conclusion that he was not. If he was not the purchaser of the intervening alley, there was a good and valid consideration to support the deed of the first of July 1815. M'*Kim* became the purchaser of lots number *one* and *thirteen*, with a perfect knowledge of the contract entered into by M*yers*, under whom he claimed, with *Bosley* and *Farnandis*; although then he might have acquired the legal title to the intervening alley in virtue of the deeds from *Lawson* to M*yers*, and M*yers* to him, still it may be asked, what equity had he in the face of M*yers*, contract, subject to the operation of which he expressly purchased, to sustain his application to a court of chancery for relief in the manner and to the extent he has asked it. It is the opinion of this court that he had none. It was contended, in the course of the argument, that the deed of the first of July 1815, did not operate to transfer the right of the parties to that instrument to the use of the alley; that it was a right of way appendant, which could not be severed from or pass without a transfer of the lots to which it was appendant. But it is perfectly clear, that in equity a contract may operate efficiently to carry the intention of the parties to that contract fully into effect, although at law it might be wholly inoperative. "Equity which adverts to the substantial object of all contracts, independent of the forms which they assume, gives effect to the intent of the parties, by considering their acts as evidence of such a contract or agreement as will produce what is stipulated." One case only, and that a familiar one, will be mentioned as illustrative of this doctrine of a court of equity. An assignment of a *chose in action*, as a bond or the like, which in law is not assignable, is valid in equity. For a court of equity proceeds upon the principle, that the assignment, although not effectual as such at law, the bond not being assignable in point of interest, amounts nevertheless to a covenant or agreement that the assignee *shall* receive the money to his own use, which covenant or agreement that court will carry into specific execution. Upon this subject—see 1 *Powell on Contracts*, 189, and the cases there referred to.

Taking this view of the subject this court do not deem it necessary to enter into an examination of all the questions which were raised in the course of the argument, it being sufficient to decide the case before them, that the appellee had no equity to support his application to the court below for an injunction.

Dorsey, J. added. The annals of judicial proceedings do not furnish a case where a court of equity has granted a perpetual injunction to a plaintiff, to protect him in the enjoyment of a naked legal right, which he, and those under whom he claims, have by the most solemn deeds stipulated not to exercise; yet such is the predicament of the complainant in this case, such the interposition sought by him.

Legal rights are to be asserted by legal means, and in such cases courts of equity never lend their aid where equity and justice do not imperiously demand it. What species of equity would that be, which would exert itself to destroy a right, secured, as far as it can be done, by deeds founded on adequate considerations, and vest it in him who had paid no consideration therefor, but had agreed, in express terms, by the deed under which he makes title, not to claim such right. This is the kind of equity sought for in this cause.

Buchanan, Ch. J. dissented. [The Reporter shave been requested by his honour Ch. J. *Buchanan* to say, in their report of this case, that his dissent from the opinion of the court was not founded on a belief that any part of the fraud alleged in the bill to have been committed by the appellant, *Bosley*, was established by the evidence in the cause; but on the contrary he was satisfied the charge was not at all supported by the proof. That his opinion rested entirely on other grounds.]

Decreed, that the decree of *Baltimore* county court, sitting as a court of equity, be reversed, but without costs; and that the injunction, heretofore issued, be dissolved, and the bill of the complainant be dismissed.

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AN

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1. An appellant may dismiss his appeal at any time. *Diffenderffer v Hughes*, 3
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3. Where on a *demurrer* judgment is given against the plaintiff, and he asks and obtains leave to amend the pleading demurred to, and he does amend, he is considered as acquiescing the judgment, and as abandoning his right to appeal from it. *Stoddert v Newman*, 251
4. After the opinion of the court was delivered, and before judgment was entered, the appellant was permitted to dismiss his appeal. *Newson's Adm'r. v Douglass*, 417
5. The refusal of an inferior court to extend a legitimate rule of that court, is not a ground of error, and is but an interlocutory proceeding, upon which an appeal will not lie. *Carroll, bail of Bradford v Barber*, 454

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1. In an action of trespass to the person of the plaintiff, other trespasses to his person, or to that of his wife, children or servants, if committed at the time of the principal trespass, (being laid in the declaration,) may be given in evidence to increase the damages; as may also the defendant's conduct and language at the same time, as proving his malice. *Shafer v Smith*, 67

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ASSUMPSIT.

1. Where the money of the plaintiff was used by a bank in paying notes of a denomination less than $5, called counter tickets, and which had been issued by the bank, signed, some by the cashier, some by the plaintiff, as teller, and some by other officers of the bank, on such notes being brought in for pay-

ment, under an advertisement of the bank for that purpose—*Held*, that the plaintiff might recover the amount in an action of *assumpsit* against the bank, without any inquiry into the authority by which such notes were issued. *City Bank of Baltimore v Bateman*, 104

2. C was employed by W principal keeper in the *Maryland Penitentiary*, (and who, as such, had authority to employ deputies,) to act as deputy-keeper, at a certain annual compensation. The compensation of all the officers of the institution was by law to be drawn from the treasury of the state. C's compensation was received from the treasury by W, who was afterwards dismissed from the institution. In an action of *assumpsit* by C against W, to recover the money so received—*Held*, that C was entitled to recover; and that it was immaterial in what manner C was employed by W—whether it was in W's public or individual capacity; and that it was also immaterial, whether W had paid over the compensation to the directors of the institution, or not, as they had no authority to receive it, and his responsibility was in virtue of his receipt of the fund.—*Chapman v Williams*, 157

3. In an action of *assumpsit* for work and labour, and materials found, where the plaintiff gave in evidence a written settlement between him and the defendant, acknowledging a balance due by the defendant, it is competent for the defendant to show that the items in the account of settlement are partnership claims due to the plaintiff and another. *Barger, et ux. Ex'x. of Athy v Collins*, 213

4. Where a debt is due to a partnership which is afterwards dissolved, and the debt is assigned by one of the partners, it is competent for such partner to sustain an action of *assumpsit* for it in his own name, by proving that the debtor, with a knowledge of such assignment, promised to pay it to him; and such promise may be implied from the acts of the debtor, as well as expressly proved. *Ib.*

5. Every collateral undertaking to answer for the debt, &c. of another is, by the statute of frauds, void, if not in writing; but original undertakings are not within the statute, and need not be in writing. *Elder v Warfield*, 391

6. Where there is a preexisting debt, or other liability, a promise to pay by a third person, having immediate respect to, and founded upon, such debt or liability, without any new consideration moving to him, is a collateral undertaking, and is within the statute. *Ib.*

7. —— But where, distinct from the original liability, there is a superadded consideration for the promise, moving between the party making it, and him to whom it is made, the undertaking is an original one, and is not within the statute. *Ib.*

8. Where there is no previous liability, but the promise of one is the inducement to, and ground of the credit given to another, such promise is also a collateral undertaking, and within the statute. The rule being, that wherever the party undertaken for, is originally liable upon the same contract, the statute applies; but where such party is under no original liability, the promise is an original undertaking, not embraced by the statute, and is good, and his becoming liable afterwards does not alter the rule, though not in writing. *Ib.*

9. In cases of the sale of goods, &c. the liability of the parties obtaining them depends upon the question, to whom was the credit given? And that is a question for the decision of the jury; though there are cases, under the statute, in which the liability of the party undertaken for, is a question of law. The debiting the party, obtaining the goods, in the books of the vendor, is not conclusive evidence that the credit was given to him. *Ib.*

10. In an action upon a valid collateral undertaking to pay the debt of another, the declaration must be on the special promise; but upon an original undertaking, the proper remedy is *indebitatus assumpsit*. *Ib.*

11. In an action of *assumpsit* on a promissory note by the holder against the maker, who was the president of a manufacturing company, and as such signed the note—*Held*, that the plaintiff was not necessarily entitled to recover.—That if the payees of the note, in selling to the company the merchandise for the amount of which the note was given, gave credit to the company, and not to the defendant, his note, given in considera-

tion of such debt, was but a promise to pay the debt of another, and void for the want of a sufficient consideration. *Wyman v Gray,* 409

12. An action of *assumpsit* in consideration of forbearance to sue a bond, whereby it became barred by the act of limitations - See LIMITATION OF ACTIONS, 4, 5, and *Veasey's Adm'r. D. B. N. v Bassett's Adm'rs.* 461

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ATTACHMENT.

1. An attachment on judgment cannot be issued from one county court to another county court. *Harden & Carson v Moores, Garn. of Presbury,* 4

2. The proceeding by attachment is not considered as embraced by the general term *execution,* as used in the acts of October 1777, *ch.* 12, and 1794, *ch.* 54. *Ib.*

3. If a defendant shall fly, remove, or absent himself out of the county in which a judgment is rendered againt him, the court of the county, in which he may happen to be, may, upon the production of a transcript of such judgment, award an execution by *ca. sa. fi. fa.* or *attachment* *Ib.*

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1. It is not the practice in this state to require a warrant of attorney to authorise the appearance of a defendant by attorney, and the *English* rules of practice upon that subject are not applicable here. *Henck v Todhunter, et al.* 275

2. When the appearance of an attorney is entered on record, it is considered as done by the authority of the party; and whatever is done in the progress of the cause in which such appearance is entered, is esteemed as done by and binding on him. Whether the attorney is or is not faithful to his trust, is a matter between him and the party. *Ib.*

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AVERMENT.

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AWARD.

1. J and G submitted by parol all matters in dispute between them to arbitration. Under this submission the arbitrators made an award, stating "that they had taken into consideration all matters, which were laid before them, in dispute between the parties, and they do hereby award and determine, that there is due from G to J $367," &c. On the back of the award was an endorsement, without date, signed by the arbitrators, stating that "the arbitrators wish it to be understood by the parties, that they have taken no notice whatever of the claim made by G for credit for dividends said to be received by J for bank and insurance stocks" In an action of *assumpsit* on this award, brought by J against G, it was in evidence, that the subject of the dividends alluded to in the endorsement on the award, was one of the matters in dispute, and one of the subjects of the reference—*Held* that the plaintiff was not entitled to recover. That as the endorsement on the award was without date, it must be inferred to have been made at the time the award was, and to have been intended to form a part of it. That therefore the award was defective in two essential particulars, 1. In its being only of parcel of the submission. 2. In its not being final on the subject of the submission—*Held* also, that it was competent in this action for the defendant to give in evidence that the plaintiff was indebted to him for dividends received on the said bank and insurance stocks. *Griffith v Jarrett,* 70

2. Where an award made by arbitrators on submission, was that E should pay to J the sum of £452, with interest, and costs of suit thereon, recovered from J by P K in chancery; and an action of debt was brought on the award by J against E to recover the sum of £452—*Held,* that as the award was for certain costs and interest, as

well as the sum of £452, it was not competent for J to sue for the latter sum only. *James v Lawrence's Adm'r.* 73

B.

BAIL.

1. A writ of *scire facias* was issued against R, as special bail of C & F, reciting, in the usual manner, the recognizance of bail, and the judgment against C & F, &c. R appeared to the writ, and moved to quash it, upon the ground, supported by affidavit, that he had only intended to become bail for F, and that the clerk of the court had by mistake entered him as bail for both C & F—*Held,* that as the writ recited the recognizance of bail, the proceedings to judgment against the principal, &c. properly, as they appeared by the record, it could not be quashed for insufficiency. *Boyle v Robinson, Bail of Coulter & Fisher,* 200

2. —— If the bail was relievable on motion, ought it not to have been made for rectifying the original entry, in which the alleged mistake in taking the bail occurred? *Quere.* *Ib.*

3. A rule of an inferior court authorising a principal to surrender himself in discharge of his bail upon a writ of *scire facias* being returned *scire feci,* at any time during the first five days of the term of the court to which the return is made, is a legitimate rule, and is, in giving time to surrender the principal, a mere matter of favour or indulgence to the bail. *Carroll, Bail of Bradford v Barber,* 454

4. —— Where the offer to surrender is, in such a case, on the sixth day after the return, it is too late, and the refusal of the court to extend the time to that period, is not a ground of error. It is but an interlocutory proceeding, upon which no appeal will lie. *Ib.*

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BANK CHECKS.

1. A party who draws a check upon a bank, without funds in the bank to meet it, is not entitled to notice of nonpayment, nor is he discharged by the holder's not presenting it within reasonable time. *Eichelberger v Finley & Van Lear,* 381

2. Between individuals there may be a mutual confidence and credit, and they may honour each other's bills with or without effects, so as perhaps to entitle them to notice, though they have no effects; but no such confidence or credit can exist between a bank and its customers; and the officers of a bank cannot, without a gross violation of their trust, honour a check or draft beyond the amount of the drawer's deposits *Ib.*

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1. Unless bills of exceptions refer to each other, they are to be considered as wholly distinct. *Gist's Adm'r. D. B. N. v Cockey & Fendall,* 134

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1. A bill of sale of all the personal estate of the grantor passes whatever personal estate then belonged to him; and parol evidence is admissible to show what that estate was. *Caule v Harrington,* 147

2. Where it did not appear by the acknowledgment of a bill of sale made before a justice of the peace, whether it was made by the grantor, or by whom it was made—*Held,* that such acknowledgment was defective, and that the bill of sale could not be recorded so as to make an authenticated copy of it evidence. *Ib.*

3. Where the plaintiff claimed title to property insured, under a bill of sale to him from the principal of the defendant—*Held,* that it was

not competent for the defendant to show that such bill of sale was intended by his principal to defraud his creditors, however unfair the conduct of the principal may have been in relation to it. *Newson's Adm'r. v Douglass,* 417

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BOND.

1. A bond payable on demand, is payable on the day of its date. *Ruff's Adm'r. D. B N. v Bull,* 14

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1. K was appointed a collector of taxes under the act of 1794, *ch.* 53, and gave bond, with sureties, as such, and proceeded to collect. In an action of *debt* on the bond against one of the sureties therein, to recover such collections—*Held,* that it was not competent for such surety to defend himself upon the ground that K had not taken the oath prescribed by law. That as K was regularly appointed collector, and bonded and acted as such, he was to be presumed to have complied with all other necessary requisites; that in an action against him he could not defend himself upon the ground of his own neglect, and that his sureties, in relation to such a defence, were in point of law, in the same situation. *Lawrenson v The State use of Levy Court, &c.* 339

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1. D & F, owners of the schooner *Superior,* sent her to *Havana,* consigned to P, where she arrived on the 3d of March 1816. P, having discharged his duties as consignee, on the 17th of April, paid the then customary duties at the custom-house at *Havana,* and he made up his accounts accordingly, and transmitted them to D & F, on the vessel's return. It appeared by parol evidence, that the *Intendant* of *Havana,* by an order stated to be *dated* the 1st of March 1816, but not made public till some time after, directed that vessels entering that port, after the said 1st of March, should pay an additional duty, and that the consignees there had been compelled to pay this duty; and that among them P, as the consignee of the *Superior,* was called on to pay it in November following, when it was paid by P's house. In an action of *assumpsit* by P, against D & F, to recover the amount so paid—*Held,* that he was individually entitled to recover; although the payment was made by his house. That a consignment transfers not only the power, but is a request to

the consignee to pay all charges to which the vessel may be liable at her port of delivery; and for such charges the consignee, if he acts in that character, becomes personally liable. *Drake v Hudson & Franciscus,* 499
2. —— *Held* also, that although the order of the *Intendant* was in writing, its contents might be proved by parol; and if not, yet payments under the order might be so proved, it being the usage and custom to pay such duties. *Ib.*

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—— Procedendo.

COURT OF CHANCERY.
1. By the act of 1798, *ch.* 4, *s.* 2, all persons, or those claiming under them, claiming certain lands by virtue of any grant, warrant, lease, license or agreement, from the proprietors of *Pennsylvania,* were entitled to a patent from this state, &c. J C was entitled to an equitable right in these lands. A judgment was obtained against him by R, and the lands of J C were sold and purchased by R, who obtained a patent for them in his own name. The representatives of J C filed a bill against R, to compel him to convey the lands to them, alleging an agreement by R to obtain a patent in the name of J C, and for his benefit, in consideration of being paid the amount of the judgment. R, in his answer denied the agreement. Two witnesses proved the existence of an agreement to relinquish the claim and right of R to the lands, upon being paid his debt, &c. The allegation in the bill that the lands were to be patented in the name of J C, was disproved; and it did not appear how they were to be patented; but as R could only obtain a patent in his name as a

claimant under J C, the presumption was *held* to be that he had an assignment from J C—*Held* also, that although when R purchased, lands held by equitable title were not liable to be sold under *fi. fa.* yet that R, by such purchase, had in equity a right to have them appropriated to the payment of his debt; and that a sale of them would have been decreed for that purpose. That giving to the agreement the most favourable interpretation, no conveyance from R could be decreed. That it was in terms an agreement within the statute of frauds—there being no evidence to bring it within the cases adjudged to be excepted from the operation of that statute. *Rowland & Reynolds v Crawford & Marcus,* 52

2. Where A had mortgaged to N certain property to indemnify him against any liability for his endorsements of sundry promissory notes, to be drawn by S in favour of T, and by him endorsed to N, not exceeding $10,000, to be negotiated for the accommodation of S and T, and such notes were so drawn, endorsed and negotiated; and N afterwards became the endorser of other notes, drawn and endorsed by said S and T, for other sums of money, and negotiable for their use; and A had by deed transferred to S and T the property thus mortgaged to N, and T had conveyed to R, in trust for the benefit of certain of his creditors, his moiety of the property so conveyed to him by A—*Held,* that the moiety of T in the property conveyed to him by A, could not be made responsible for more than the $10,000, secured by the mortgage from A to N; and that the doctrine of *tacking* could not be brought to bear on the case. *Chase, et al. v M'Donald & Ridgely,* 160

3. —— As against a surety the contract cannot be carried beyond the strict letter of it—it cannot be extended by equitable construction. *Ib.*

4. —— But as S mortgaged to N his part of the property conveyed to him by A, which had been included in the mortgage from A to N, and also other property, to secure N for his endorsements, therefore, as respects S, he by express contract made his property liable beyond the sum expressed in the mortgage from A to N. *Ib.*

5. —— As the evidence showed that N did not incur his further responsibility upon the immediate credit of the land mortgaged to him by A, the doctrine of *tacking* cannot prevail. *Ib.*

6. —— If the bill had been filed by N against T, as mortgagor, to foreclose the mortgage, he could not have a right to tack his claim to the prejudice of other creditors. *Ib.*

7. There is a distinction between a bill to redeem, and a bill to foreclose a mortgage; in the latter case the mortgagee cannot insist on tacking his subsequent debt, as he may do in a bill for a redemption. *Ib.*

8. The rules which have been adopted in *England,* in relation to pleas in bar to bills in equity, when resorted to by defendants, are considered as applicable to them here; and where the defendant's plea was not set down for hearing, and no replication was filed to it—*Held,* that the plea did not operate as a bar to the complainant's suit. *Ib.*

9. In a deed of mortgage from A to N, it was recited that S and T were about to obtain a loan of $10,000 at the *Union Bank,* on notes to be drawn by S in favour of T, and by him endorsed to N, and to be renewed from time to time, &c. That A had agreed to secure the payment of the notes, and to indemnify N for the endorsements of the said notes, or any of them. For which purpose A conveyed certain property to N in fee, with a proviso, that if A, S and T, or either of them, should at all times save harmless N, by reason of any endorsement made by him of the notes of S, not exceeding $10,000, the deed was to be void. The loan was negotiated at the *Union Bank,* and the notes renewed from time to time, drawn and endorsed as above mentioned, until they were afterwards paid by proceeds of a loan obtained upon other notes, drawn and endorsed in like manner, at the *City Bank*—*Held,* that as the debt due at the *Union Bank* was closed by funds obtained from the *City Bank,* the mortgage from A to N remained as a surety to indemnify N against any liability for his endorsements of the last mentioned notes. *Ib.*

10. On a bill filed praying a decree for the sale of mortgaged property for the payment of the mortgaged debt, where the mortgage was not recorded—*Held* by *Johnson*, Chancellor, that in the distribution of the proceeds of sale of the mortgaged premises, (which had been decreed to be made,) the mortgagees were not entitled to a preference over the creditors of the mortgagor, who became such subsequent to the date of the mortgage; but that they were so entitled in relation to prior creditors—*Held* also, that although this priority of the mortgagees did not extend to the subsequent debts of the mortgagor; yet that the mortgagees, being entitled to priority over previous debts, they were entitled to the benefit of those debts in the distribution of the proceeds of sale, so as to reduce the proportion of subsequent creditors to what it would have been if the previous debts had been fully allowed. *Pannell & Smith v Farmers' Bank of Maryland, et al.* 202

11 —— On an appeal by some of the creditors of the mortgagor, the appeal was *dismissed*, because there was no proof of their debts. *Ib.*

12 S devised his real estate to his son J, at and for the price of £2000, the same to be paid by J, in equal shares, and at defined periods, to ten of the other children of the testator—J to give his bonds to such of the children, as were of age, for the payment of their proportions; and that J should have such estate in fee, he complying and paying to the children their said shares of the said money. J took possession of the estate under the devise, paid some of the legacies, and afterwards sold the estate in fee to K, and executed a conveyance, referring to the devise, with warranty of title, K paying him at the time of the conveyance, a part of the purchase money, and giving him his bonds for the residue. Some of these bonds were assigned by J to M. One of the bonds assigned to M, was paid by K, who always admitted his liability for the rest. K then died, and M obtained judgments at law upon the bonds he held, against D, the executrix of K. Some of the legacies bequeathed to S's children were not paid, and a decree was passed for the sale of the said estate for their payment. K, by his will, dated *before the conveyance* to him of the estate, devised all his estate to D, and made her his executrix. On a bill filed by D, stating herself to be the executrix and devisee of K, against M, to be relieved from the said judgments, on the ground that the said legacies were outstanding, and an incumbrance on the said estate, and that until they were discharged, the payment of the bonds should not be enforced. A copy of K's will, and of his deed from J, were filed as exhibits with the bill. M's answer admitted D to be the devisee of the estate—*Held*, 1. That land acquired after the execution of a will, does not pass by the will. *Kemp's Ex'x. v M'Pherson, et al.* 320

13. —— *Held*, 2. That whether the admission in M's answer, that D was the devisee of the said estate, when by D's own showing it appeared that she was not, precluded an inquiry into that fact, and that it was to be considered as not in issue? *Quere.* *Ib.*

14. —— *Held*, 3 That the legacies were a charge on the estate, either in the hands of J, or of the purchaser under him. *Ib.*

15. —— *Held*, 4. That it is a general rule that an assignee of a bond is liable to all equities which exist against his assignor, yet there are circumstances which may place the assignee in a better situation than the assignor. That the conduct of the obligor may be such as to deprive him of an equity which he had against the assignor. *Ib.*

16. —— *Held*, 5. That wherever an assignee is induced to believe by the obligor, that the bond to be assigned will be paid, it would be a deceit upon the assignee to suffer the obligor afterwards to set up as a defence a concealed equity existing between him and the assignor. *Ib.*

17. —— *Held*, 6. That under the circumstances of this case, the equity relied upon in the bill against the bonds upon which the judgments were rendered, was a concealed equity between the obligor, and assignor, and could not affect M, the assignee; and, therefore,

the relief prayed could not be granted. *Ib.*

18. A, by will, devised his real estate to his wife S for life, and after her death to his brother C, in fee, charged with the payment of £500 to each of his two sisters, in one year after C took possession of the estate. After the death of A, his widow S, the tenant for life, married D in 1812. In 1814 D entered into a written contract with C, the remainderman, by which C agreed to sell him all his interest in the estate for $10,000, payable in three equal annual payments—the first to be paid on the 25th of December 1814, and all, except $2800, bearing interest till paid. D was to give bond, with security, for the payment of the purchase money in manner before mentioned, and on payment thereof, C was to execute a conveyance of the land to D, in fee. Endorsed on the contract was this agreement: "It is understood that the legacies, charged by the will of A, to be paid out of his real estate, are not to be satisfied by D, but that the land is to be exonerated by C, from the payment thereof." The first instalment under the contract was paid by D, and bond, with security, given for the balance. On this bond judgment was rendered at law against D; one of the legacies charged upon the estate being still outstanding, and the other having been purchased by D. A bill was filed by D, praying an injunction to stay proceedings on the judgment. After the filing of the bill the outstanding legacy was purchased by C—*Held*, 1. That the true construction of the agreement endorsed on the contract of purchase between C and D, was that the estate itself was to be freed from all liability to pay the legacies with which it was charged, and not merely that D was to be personally indemnified from their payment; and that though it was an agreement which C might have some difficulty in complying with, it was not an impossible one; and that he was bound to perform it before he could call on D for the whole purchase money. *Dorsey v Smith*, 345

19. —— *Held*, 2. That as the money was to be paid in instalments, and the agreement was in general terms that the land was to be exonerated from the outstanding legacies, C had, *until the last instalment became due*, to comply with the agreement; and that, therefore, upon the instalments, which fell due before that time, D was bound to pay interest, although the legacies were not discharged, having by his contract expressly agreed to pay interest. That D could not have relieved himself from the payment of this interest, unless he had actually tendered the amount due. *Ib.*

20. —— *Held*, 3. That upon the last instalment interest could not be charged for the whole time, as the legacies were still outstanding, and C refused to exonerate the land from their payment, he supposing that he was not bound to do so, but merely to give D a personal indemnity against them. That it would, however, be otherwise, and interest might be charged, if D could be considered as having taken possession under his purchase, or to have been in the reception of the rents and profits of the estate sold. *Ib.*

21. —— *Held*, 4. That D was to be considered as the purchaser only of a dry remainder—there being a tenant for life in possession. *Ib.*

22. —— *Held*, 5. That the wearing out of a life-estate, in a case of this kind, is not, as a general rule, equivalent to the taking of the profits, so as to charge the purchaser of the remainder with interest, unless the purchaser has *himself been in default*, and the delay in the completion of the contract has been owing to such default. *Ib.*

23. —— *Held*, 6. That when C purchased one of the legacies he was entitled to a part of the last instalment, and to interest upon it, from the time of such purchase. *Ib.*

24. —— *Held*, 7. That when an instrumentary witness resides out of the jurisdiction of the court, so as not to be amenable to its process, or cannot be found after diligent inquiry, the proof of his handwriting is evidence of every thing on the face of the instrument. *Ib.*

25. —— *Held*, 8. That D was not entitled to be credited for the legacy

bought in by him to the amount paid by him, but only for its fair value at the date of the purchase, and that that value was to be estimated by analogy to the rule adopted in the court of chancery in this state, for ascertaining a widow's allowance in lieu of dower in land sold under a decree of that court, and not by a reference to Dr. *Halley's* table of observations. *Ib.*

26. —— *Held*, 9. That each party, being in some respects in default, was to pay his own costs in the court of chancery. But costs were allowed the appellant on the appeal. *Ib.*

27. L, the owner of a parcel of ground in the city of *Baltimore*, wishing to dispose of it, caused it to be laid out in lots, and alleys for the benefit of the lots, and a plot of the whole to be made, and afterwards sold the lots at public sale, as located on the plot, which was exhibited at the sale. M became the purchaser of lots Nos. 1 and 13, divided on the plot by a N & S 10 feet alley, and beginning, each of them, at the upper end of the alley; and B and F, and others, purchased the lots below, which were separated by the same alley, and bounded by it. L afterwards conveyed to M, not only the lots 1 & 13, but that part of the said alley which intervened between; and M, supposing himself to have title to the soil of that part of the alley itself, as well as to his lots, built upon a part of it. There was some evidence to show, that it was understood, at the sale, that the purchaser of those two lots was also to have the intervening portion of the alley. After M's building had been erected several years, B, one of the purchasers of the lower lots, began to question M's right to the alley itself between his two lots, and his right to put his building upon it; and the difference between M and B terminated in a deed of compromise, by which M relinquished all right to the use of the alley below his lots, to B & F, and they relinquished all their right to M, to the part of the alley between M's lots. M afterwards sold his said lots and building to J, and conveyed them to J, expressly subject to the said deed of compromise between M and B & F. After J's purchase, B prevented his using that part of the alley below his said lots 1 & 13, by obstructions placed therein. On a bill filed in equity by J to have those obstructions removed, and himself quieted in the enjoyment of this part of the alley; and alleging that the said deed of compromise was obtained from M by fraud and threats on the part of B, and in mistake of M's rights; and praying to have that deed set aside so far as it restrained M from the use of the said part of the alley—*Held*, 1. That from all the evidence in the cause, M was not to be considered as the purchaser, at the original sale, of the alley intervening between lots 1 & 13. *Bosley v M'Kim*, 468

28. —— *Held*, 2. That M not having so purchased, there was a sufficient consideration for his deed of compromise with B & F. *Ib.*

29. —— *Held*, 3. That even if M had legal title to the alley between his said lots, by virtue of the conveyance to him from the original proprietor; yet as J bought from him expressly subject to the said deed of compromise, J was not entitled to the relief prayed. *Ib.*

30. —— *Held*, 4. That although the deed of compromise might not operate at law as a transfer by the parties to it of the right to the use of the alley, on the ground that that right was a right of way appendant to the lots, and could not be severed from the lots themselves; yet that in equity it would operate sufficiently to effect the design of the said parties. *Ib.*

31. —— *Held*, 5. That upon the whole case J had no equity to support his application for the relief prayed by him—His bill dismissed but *without costs*. *Ib.*

32. There is no case in which a court of equity ever granted a perpetual injunction to a plaintiff to protect him in the enjoyment of a naked legal right, which he, or those under whom he claims, have stipulated by deed not to exercise. Per *Dorsey*, J. *Ib.*

33. Legal rights are to be asserted by legal means; and in such cases courts of equity never lend their aid where equity and justice do not imperiously demand it. *Ib.*

See Executors & Administrators 8, 9.

See Husband & Wife 3, 4.
—— Mortgage 2.

COVENANT.

1. A covenant not to sue generally, without any limitation as to time, is in law a release, and may be pleaded as such; but a covenant not to sue for a limited period, cannot be pleaded in suspension of a creditor's action; and if he sues, the debtor's remedy is an action upon the covenant. *Clopper's Adm'r. v The Union Bank of Maryland,* 92

2. In *covenant* for rent arrear, there must be a perfect privity between plaintiff and defendant, but such privity is not necessary to make a person's goods liable to a distress for rent as a tenant. *Howard v Ramsay,* 113

CREDITOR.

See Court of Chancery 10.
—— Devisee 1, 2.
—— Mortgage 1.
—— Simple Contract Creditor.

CROP.

See Emblements.

CUSTOM.

See Usage.

D.

DAMAGES.

1. In no case can damages be recovered in one action for an independent substantive injury, for which another form of action is prescribed. *Shafer v Smith,* 67

See Trespass 2, 3.

DATE.

See Consignee & Consignor 1; and argument of *Frick* in *Drake v Hudson & Franciscus,* 403

DAY BOOK.

See Evidence 26, 27.

DEBT.

1. Debt upon an award, made under the submission of J, (the plaintiff,) and E, (the former administratrix,) brought against O, the present administrator—See DECLARATION 1, 2, and *James v Lawrence's Adm'r.* 73

See Extinguishment 1, 2.

DEBTOR & CREDITOR.

See Court of Chancery 10.
—— Mortgage 1.

DECLARATION.

1. A declaration in trespass for preventing the plaintiff from using the water in *his* well, and the evidence proving the well to belong to the defendant, is a fatal variance. *Shafer v Smith,* 67

2. In debt on an award, the declaration to recover the sum of £452, stated that certain differences having arisen between J, the plaintiff, and E, formerly administratrix of R deceased, J and E by consent and by order of the orphans court of the county, referred the disputed claim of J against the estate of R, to A, &c. who were on the same day approved by the orphans court for that purpose, &c. That the arbitrators awarded in writing, that E should pay to J the sum of £452, with interest, and costs in a particular suit, which was mentioned. E afterwards intermarried with B, and was duly removed from her administration of the estate of R, and O, the defendant, appointed administrator of R, in her place, and took upon himself such administration; yet that neither E, nor O, had paid to J the said sum of £452, in the award mentioned, although both of them had been requested, &c. whereby an action accrued to J, to demand of O, the said sum of £452. On demurrer to the declaration, the demurrer was ruled good; and *Held,* that as the award was for interest, and certain costs, as well as the said sum of £452, it was not competent for J, the plaintiff, to sue for the latter sum only. *James v Lawrence's Adm'r.* 73

3. —— *Held* also, that as the declaration stated the award to be that E should pay the amount of the award in her individual, and not in her character as administratrix, it was not competent to charge that amount on O, the defendant, as administrator of R—And also, that if the declaration had alleged the award to be that E should, as administratrix, pay, &c. and if, in this form of action, a subsequent administrator of R, might be liable as administrator to pay such debt, the declaration would not entitle J to

recover; because the breach laid in the declaration was *that neither E, nor O, had paid, whereby J had a right to demand the debt of O,* which was charging him, not as administrator, but individually; and a judgment against him would be *de bonis propriis,* which could not be admitted. *Ib.*

4. In an action upon a valid collateral undertaking to pay the debt of another, the declaration must be on the special promise; but upon an original undertaking the proper remedy is *indebitatus assumpsit.* *Elder v Warfield,* 391

See Pleading 9, 10
—— Promissory Note 5.
—— Trespass 4, 5.
—— Variance 1.

DECLARATIONS.

1. Although generally the admissions or declarations of third persons are inadmissible evidence; yet where the relation of principal and agent is established, the acts and declarations of the agent, within the scope of his authority, are as admissible evidence as the acts and declarations of the principal himself; but not so where they are made out of the limits of his authority. In the latter case the agent must be produced. *City Bank of Baltimore v Bateman,* 104
2. A declaration made by the president of a bank to one of the inferior officers, that certain money, which had been brought into the bank by one of the directors of the bank, was the money of the plaintiff—*Held,* not to be admissible evidence, because he had no authority, as president, to make such declaration; and because, although the corporate name of the bank was "The President," &c. and he is sued in that name, he is only so sued, and is only liable in his corporate capacity, and cannot be considered as a party on the record, so as to let his declarations in evidence against himself, but he should be produced as a witness by the plaintiff; as he might be so produced, and compelled to testify, although he was also a stockholder, and his evidence might affect his interest as a stockholder. *Ib.*
3. In action of *trover* for slaves, in which the plaintiff claimed title under a bill of sale from F, the former owner, and the defence was, that F had afterwards manumitted them—*Held,* that the declarations of F, made between the date of the bill of sale, and the deed of manumission, that he had sold the slaves to the person under whom the plaintiff claimed, was competent evidence for the plaintiff.—*Coale v Harrington,* 147

DEED.

See Bill of Sale.
—— Compromise.
—— Conveyance.
—— Copy.
—— Enrolment.
—— Evidence 13, 14, 15.
—— Gift 1, 2, 3.

DEMAND.

1. A bond or note payable on demand, is payable on the day of its date. *Ruff's Adm'r. D. B. N. v Bull,* 14

DEMISE.

See Ejectment 1.

DEMURRER.

See Pleading.

DEPUTY.

See Principal & Agent 1.

DESCENTS.

1. R having two sons A and O, and several other children, died in 1768, having by his will devised a tract of land to his youngest son O for life. A died in 1785, leaving two sons, T and J. T in 1790 married K, by whom he had before had an illegitimate son called F, and whom, after his marriage, he acknowledged to be his child; and he had also other children after his marriage, and died in 1803. O, the tenant for life, died in 1817 intestate, leaving children now living. In an action of ejectment, brought on separate demises stated in the declaration—the first by the children of T, born after his marriage, and the other by F—*Held,* that the plaintiff was entitled to recover on the demise of F. *Bevans v Taylor, et al. Lessee* 1

DEVIATION.

See Insurance 2, 3, 4, 5, 6, 7.

DEVISE.

1. Where R. having two sons, A and O, and several other children, died in 1768, having by his will devised a tract of land to his youngest son O for life. A died in 1785, leaving two sons, T and J. T married and had children, his eldest son F. O, the tenant for life, died in 1817, intestate, leaving children now living. On an ejectment by F—*Held*, that he was entitled to recover. *Bevans v Taylor, et al. Lessee,* 1
2. G, being seized of two tracts of land called *C* and *W*, of which W was the eldest tract, devised *C* to F; and by a subsequent clause in his will directed that *W* should be sold for the payment of his debts. Under this direction *W* was sold to M. The lines of the two tracts conflicted; and in an action of ejectment brought by the devisee of *C*, (the junior tract,) against M, to recover that part of *C* which was included within the lines of *W*, (the elder tract)—*Held*, that the plaintiff was not entitled to recover. That the true construction of the devise of *C* was, that the devisee thereof took only so much of that tract as was not covered by the lines of *W*, the elder tract. *Benson's Lessee v Musseter,* 208
3. M, by will devised to "R & J, and to their heirs and assigns, forever, as tenants in common, equally to be divided between them, all that tract of land called *P F;* but if either of them dies before *the age of* 21 *years, and without issue,* then I will that one equal half part of the said land be held and enjoyed by G, his heirs and assigns, forever; and in case the said R & J should *both die before the age of* 21 *years as aforesaid, and without issue,* then I give and devise the whole of *P F* to the aforesaid G, his heirs and assigns, forever."—*Held,* that R & J took, under this devise, an estate in fee in the land devised, defeasible upon their dying before the age of 21, and without issue, and to become absolute, either on their reaching that age, or dying under that age, leaving issue. *Dallam v Dallam's Lessee,* 220
4. —— A limitation over on a dying *without issue generally,* when applied to real estate, means an indefinite failure of issue; though it is otherwise in bequests of personal property. *Ib.*
5. In order to effectuate the intention of the testator, the word *or,* will be construed *and,* or *and or. Ib.*
6. Land acquired after the execution of a will, by which the testator devised all his estate to D, does not pass by the will. *Kemp's Ex'x. v M'Pherson, et al.* 220
7. A devised to his wife F, an estate for life, remainder over to his daughter E, and in case E died *without heirs,* remainder over to his brother B—*Held,* that E took an estate tail in the lands devised—the words *without heirs,* preceding the last remainder, meaning *heirs of the body only,* and not being sufficient to enlarge the interest of E into a fee simple. *Pratt's Lessee v Flumer, et al.* 5 *Harr. & Johns.* 16

DEVISEE.

1. A simple contract creditor of a deceased, cannot charge his devisee *solely* on the ground that real assets have come to his hands. *Gist's Adm'r. D. B. N v Cockey & Fendall,* 134
2. —— And where a devisee expressly promised to pay such a debt, the promise is *nudum pactum,* unless real assets have come into his hands; and where assets have come, such a creditor can only recover in an action against the devisee, by proving the debt, and proving the value of the assets. *Ib.*

See Executors & Administrators 8, 9.

DIRECTION OF THE COURT.

See Jurisdiction 1.
—— Law & Facts.

DISBURSEMENTS.

See Evidence 25.
—— Insurance 13.

DISCOUNT.

See Evidence 25.
—— Insurance 13.

DISMISSAL.

See Appeal 1.

DISTRESS.

See Pleading 2, 10.
—— Rent.

DISTRIBUTEE & DISTRIBUTION
See Court of Chancery 10.
—— Interest 1.
—— Mortgage 1.
—— Widow 2.

E.

EASEMENT.
See Way; and *Bosley v M'Kim*, 468

EJECTMENT.
1. A declaration in ejectment contained two counts, one on a demise by A, and the other on a demise by B—*Held*, that the plaintiff might recover on the count whereby the land was demised by B, although he could not recover on the other count. *Bevans v Taylor, et al. Lessee*, 1
2. In an action of ejectment where the defendant's title to the land sued for, and his only defence, was under a supposed will of a former owner, and it appeared that there had been a former action of ejectment against the defendant, in which the same question was in issue, and in which the said supposed will was adjudged to be invalid, and the case on that ground decided against him—*Held*, that he was not thereby concluded from going into evidence to establish the legality of the will. *Edelen v Hardey's Lessee*, 61
3. Under a demise in a declaration in ejectment of an entire tract of land, less than the whole may be recovered, but it must be an entire and not an undivided interest. *Benson's Lessee v Musseter*, 208
See Devise 2.
—— Grant 1.

EMBLEMENTS.
See Husband & Wife 1.

ENROLMENT.
See Bill of Sale 2.
—— Court of Chancery 10.
—— Evidence 13, 14, 15.
—— Mortgage 1.

EQUITY.
See Court of Chancery.

EQUITABLE ESTATE.
See Court of Chancery 1.

ERROR.
1. It is no error in an inferior court to refuse to give an opinion on an abstract proposition. *Coale v Harrington*, 147
See Writ of Error.

ESTATE TAIL.
See Devise 7.

ESTOPPEL.
See Court of Chancery 27, 28, 29, 30.

EVIDENCE.
1. An executor's having settled an account of his executorship with the orphans court, and being charged by that court with the appraised value of the estate of his testator according to the inventory, is not conclusive evidence that he had fully administered the effects of the deceased, and that thereby they became his right. *Haslett's Adm'r. D. B. N v Glenn*, 14
2. Where there was a variance between the date of a promissory note declared upon, and that offered in evidence—*Held*, that as there was a count in the declaration for money had and received, the note was, under that count, properly given in evidence. *Coursey v Baker*, 28
3. Where an instrument of writing purports to have been attested by a person, whose name is subscribed as a witness, it must be proved by the testimony of such witness, unless he cannot be procured, by reason of his absence, death, interest, or other disqualification, subsequent to the attestation; in which case evidence may be given of his handwriting; and it is also usual to prove the signature of the contracting party. *Handy v The State use of Townsend*, 42
4. —— The party is not concluded by the testimony of the subscribing witness; as, if he denies his attestation, it may be proved by other witnesses; or, if he denies the due execution of the instrument, other testimony may be resorted to, to prove it, &c. *Ib.*
—— So where it can be proved that the name of the person appearing as a subscribing witness to an instrument of writing was written by another without his knowledge or assent, the party may be permitted to prove it; and in such case, he is not to be considered as an attesting witness—it stands as an instrument without an attesting witness, and subject to be proved

by any other admissible evidence. *Ib.*

6. In an action on a testamentary bond, brought at the instance of the only daughter of the deceased, to recover two-thirds of what remained in the hands of the executrix of the personal estate of her father, after payment of debts, &c. the will of the deceased was offered in evidence, with the endorsements thereon, stating that the will was proved on the 25th of November 1800. Also an endorsement of the same date, every line and word of which, except the date, was cancelled and obliterated by a pen being drawn through each line, purporting to be a renunciation (in substance such as is required by the act of 1798, *ch.* 101 *sub ch.* 13, *s.* 2,) executed by the widow of the testator, by making her mark; and also purporting to be attested by J B R, the register of wills, both whose names, together with the mark, being in like manner obliterated. Also another endorsement, purporting to be a certificate by J B R, the register of wills, that on the same day A T, the widow of the deceased, appeared and quitted claim to the several bequests and devises made to her in the will of her husband, and elected in lieu thereof her dower or third part of his estate, both real and personal. There was proof that A T was an illiterate woman, and could not write. It was also proved by J B R that he did not see A T put her mark to the said renunciation, and that his name signed to it as a subscribing witness was not in his handwriting, but in the handwriting of E W, who was then his deputy, and is since dead; and that the whole writing was in the hand of E W, who was in the habit, but without authority, of signing his, J B R's name, as a witness to other than official papers—*Held*, that the obliterated paper, purporting to be a renunciation of A T, was not admissible in evidence—*Held* also, that the writing purporting to be a certificate by the register of wills, that A T did, on the 25th of November 1800, renounce the bequest to her in her husband's will, was an act not required or authorised by law, and was not admissible in evidence to prove the execution of renunciation by her. *Ib.*

7. Though illegal evidence is received by the inferior court without objection, it may still be rejected by the appellate court. *Ib.*

8. If an instrument of writing be mutilated, it is *prima facie* evidence of cancellation; though proof may be admitted to show that the mutilation was by accident or fraud. *Ib.*

9. If evidence is given in the court below, by consent of parties, its legality cannot be questioned in the appellate court. *Edelen v Hardey's Lessee,* 61

10. In an action against a banking company, where the sum of money in dispute was proved by other evidence to have belonged to the plaintiff, it was held competent for him to give in evidence the directions of the president and cashier to their inferior officers, in relation to the manner in which they were to apply such money in discharge of the debts of the bank, although the president and cashier were within reach of the process of the court, as it was presumed they had authority to give such directions. *City Bank of Baltimore v Bateman,* 104

11. The declarations of the president of a bank are not admissible evidence in an action against the bank, where he had no authority as president to make such declarations; and although the corporate name of the bank was "The President," &c and he is sued in that name, he is only so sued, and is only liable in his corporate capacity, and cannot be considered as a party on the record, so as to let his declarations in evidence against himself; but he should be produced as a witness by the plaintiff, as he might be so produced and compelled to testify, although he was a stockholder, and his evidence might affect his interest as a stockholder. *Ib.*

12. The defendant having given in evidence a written agreement between B and himself, and W, by which B agreed to deliver what bricks might be necessary to build certain houses, in which the defendant, the plaintiff and W, and others, had associated together to build, and that in payment for the

bricks B was to take one of the houses, the plaintiff offered to prove by B, that at the time this agreement was made, W and D stipulated that the houses were to be finished by a particular time—*Held*, that such evidence could not be given by the plaintiff, because not being a party to the agreement, he was not bound by it, and could not, therefore, avail himself of it in his favour. *Owings & Pict v Low*, 124

13. Where it did not appear by the acknowledgment of a bill of sale made before a justice of the peace, whether it was made by the grantor, or by whom it was made —*Held*, that such acknowledgment was defective, and that the bill of sale could not be recorded so as to make an authenticated copy of it evidence. *Coale v Harrington*, 147

14. An authenticated copy of an instrument of writing, improperly admitted to record, or not required to be recorded, is not competent evidence. *Ib.*

15. The act of 1763, *ch.* 13, requiring deeds of gift of slaves to be recorded only where the donor retains possession, a copy of such a deed, the original of which had been recorded, where the possession passed out of the donor at its execution, is not admissible in evidence. *Ib.*

16. In an action of *assumpsit* for work and labour done, &c. where the plaintiff gave in evidence a written settlement between him and the defendant, acknowledging a balance by the defendant, it is competent for the defendant to show that the items in the account of settlement are partnership claims due to the plaintiff and another. *Barger, et ux. Ex'x. of Athey v Collins*, 213

17. An account stated is not conclusive on the parties to it, but may by either party be modified by other evidence. *Ib.*

18. Where a debt is due to a partnership which is afterwards dissolved, and the debt is assigned to one of the partners, it is competent for such partner to sustain an action of *assumpsit* for it in his own name, by proving that the debtor, with a knowledge of the assignment, promised to pay it to him; and such promise may be implied from the acts of the debtor, as well as expressly proved. *Ib.*

19. The mere filing an account in bar is no evidence of the truth of the account. *Ib.*

20. Where there is no evidence before the jury of a fact, or the evidence offered is so vague and indefinite that no rational inference of such fact can be deduced from it, the court ought to direct the jury that it is not competent for them to find such fact. *Davis v Davis, et al.* 36

L. & J. Riggin v Patapsco Insurance Company, 279

21. When an instrumentary witness resides out of the jurisdiction of the court, so as not to be amenable to its process, or cannot be found after diligent inquiry, the proof of his handwriting is evidence of every thing on the face of the instrument. *Dorsey v Smith*, 345

22. The debiting the party obtaining goods sold in the books of the vendor, is not conclusive evidence that the credit was given to him. *Elder v Warfield*, 391

23. It is competent for an agent to show that a policy of insurance was effected by him as agent for another person; and the letters of that person to the agent, directing the insurance, is admissible evidence of that fact. *Newson's Adm'r. v Douglass*, 417

24. The words "whom it may concern," in a policy of insurance, suppose an agency, and look solely to the principal in whose behalf, or on whose accounts, the agent acts. Such principal is in the contemplation of the contract, and is the one whom it alone concerns, and his existence may be proved by extrinsic evidence. *Ib.*

25. The sworn certificate of the captain of a vessel, insured by an agent, of the disbursements, of the agent upon the vessel, is not evidence of such disbursements, in an action by the principal against the agent, to recover the amount received by the agent upon the insurance; but the captain himself should be produced. *Ib.*

26. Proof, that the articles charged in the day-book of the plaintiff, were in the handwriting of a clerk of the plaintiff, who was dead, admitted as proper and competent

evidence. *King v Maddux's Ex'r.* 467

27. The defendant cannot claim an entry in the day-book of the plaintiff as evidence of a credit, without all entries on said book, in which the defendant is debited, going to the jury as evidence. *Ib.*

See Assault & Battery 1.
—— Award 1.
—— Declarations 1, 2, 3.
—— Executors & Administrators 8, 11.
—— Insurance 8, 9, 13.
—— Law & Facts.
—— Limitation of Actions 4, 5.
—— Parol Evidence.
—— Rent 3, 4.
—— Trespass 2, 3, 4.
—— Trover 1.
—— Use & Occupation 1.
—— Will 1, 2.
—— Witness.

EXECUTION.

1. The proceeding by attachment on judgment is not considered as embraced by the general term *execution*, as used in the acts of October 1777, *ch.* 12, and 1794, *ch.* 54. *Harden & Carson v Moores, Garn. of Presbury,* 4

2. If a defendant shall fly, remove, or absent himself out of the county in which a judgment is rendered against him, the court of the county, in which he may happen to be, may, upon the production of a transcript of such judgment, award an execution by *ca sa. fi. fa.* or *attachment,* *Ib.*

3. If a defendant shall *remove* from the county in which a judgment is rendered against him, an *execution* may issue from the court of such county, to the sheriff of the county in which the defendant shall reside, &c. *Ib.*

4. Executions thus issued, accompanied with a short copy of the judgment, may be renewed out of the county court to which they are returned. *Ib.*

See Fieri Facias.

EXECUTORS & ADMINISTRATORS.

1. An action may be maintained by the plaintiff in his own right, on a bond executed *to him as administrator* of a person deceased. *Ayres v Toland,* 3

2. An executor cannot make the property of his testator his own, by paying the debts of the testator out of his own funds to the amount of the appraisement of the estate. *Haslett's Adm'r. D. B N. v Glenn,* 17

3. An executor's having settled an account of his administration with the orphans court, and being charged by that court with the appraised value of the estate of his testator, according to the inventory, is not conclusive evidence that he had fully administered the effects of the deceased, and that thereby they became his right. *Ib.*

4. A promissory note drawn by A, in favour of B, endorsed by B to C & D, *executors of T,* and by C, *one of the executors,* endorsed to the plaintiff. C died, and an action of *assumpsit* was brought on the note against D, in which he was styled in the writ and declaration *executor of T,* and his liability and undertaking were alleged to be in that character, and he confessed judgment, and the entry of the judgment stated it to be against him *as executor.* On appeal—*Held,* that such judgment was, notwithstanding, a judgment *de bonis propriis. Curtis's Ex'x. v Bank of Somerset,* 25

5. —— *Held* also, that judgments against executors or administrators, upon contracts made by them after the deaths of their testators or intestates, are properly *de bonis propriis,* though they state themselves to contract in their representative capacity, and though they are so called in the proceedings in the actions brought against them upon such contracts. *Ib.*

6. During a contest about the will of a deceased person, letters of administration *pendente lite* were granted to A, who gave bond, with sureties. A creditor of the deceased brought an action against the administrator *pendente lite,* and the writ was returned *non est inventus.* An action was then brought on the administration bond, against one of the sureties therein, and was pending when the contest about the will was decided by admitting the will to probat, but no letters testamentary were taken out on the estate of the deceased—*Held,* that the authority under the

letters *pendente lite*, was at an end when the contest about the will terminated in the orphans court Also, that suits upon the special administration bond, whether against the principal, or his sureties, might be abated by them. *The State use Scoffield v Craddock*, 40

In an action of debt on an award, the declaration stated the award to be, that E (the former administratrix of R,) should pay the amount awarded, in her individual character, it was held not competent to charge that amount on O, (the defendant and present administrator of R,) as such administrator—Also, that if the declaration had alleged the award to be that E, should as administratrix pay, &c. and if, in this form of action, a subsequent administrator of R might be liable, as administrator, to pay such debt, the declaration would not entitle the plaintiff to recover; because the breach laid in it was *that neither E, nor O, had paid, whereby the plaintiff had a right to demand the debt of O*, which was charging O, not as administrator, but individually; and a judgment against him would be *de bonis propriis*, which could not be admitted. *James v Lawrence's Adm'x.* 73

8. Where an action is brought against an executor or original administrator, and pending it he dies, the administrator *de bonis non* may, under the act of 1785, *ch.* 80, be made a party. *Gist's Adm'r. D. B. N. v Cockey & Fendall*, 134

9. Accounts settled by executors or administrators in the orphans court, are *prima facie* evidence to show the situation of the personal estate of the deceased, in all controversies between the executor or administrator, and the representatives of the deceased, and in actions by creditors against the heirs or devisees of the deceased, and to warrant a sale of the real estate by a decree of the court of chancery. But such accounts are not evidence at all of overpayments by executors or administrators, or that the claims stated in them to have been paid, were debts justly due by the deceased, and chargeable upon his real assets, either at law or in equity. *Ib.*

10. If after exhausting the personal assets, an executor or administrator does pay debts of the deceased out of his own funds, he has a right only to be substituted in the place of the creditors whose debts he paid, and he must establish his claim by the same kind of testimony which would be demanded of them. *Ib.*

11. In an action of *assumpsit* against N, to charge her as executrix of C, with rent accruing after O's death, upon a demise from the plaintiff to C, evidence must be given, on the plea of *non assumpsit*, of her being executrix, as well as that she occupied the demised premises. *Stoddart v Newman*, 251

See Limitation of Actions 1, 3.

EXECUTORY DEVISE.

See Devisee 3.

EXEMPLIFICATION.

See Copy.

EXTINGUISHMENT.

1. A debt or right of action cannot be extinguished by the acceptance of an obligation or undertaking of equal dignity—it must be one of higher grade to produce that effect. *Bowers's Adm'x. v The State use of Dryden*, 32

2. A *feme sole*, of the age of 16 years, passed her receipt to her guardian for the full amount of her personal estate, without having received it, but in consideration of her guardian's single bill, payable at a future day, for the amount of the personal estate—*Held*, that the guardian's bond was still liable, and that an action might be maintained upon it to recover the value of the said estate. *Ib.*

See Promissory Note 6, 7.
—— Way.

F.

FACTS.

See Law & Facts.

FATHER & CHILD.

See Parent & Child.

FEE SIMPLE.

See Devise 3.

FEME COVERT.

See Husband & Wife.

FEME SOLE.

1. A *feme sole*, of the age of 16 years, passed her receipt to her guardian

for the full amount of her personal estate, without having received it, but in consideration of her guardian's single bill, payable at a future day, for the amount of the personal estate—*Held*, that the guardian's bond was still liable, and that an action might be maintained upon it to recover the value of said estate. *Bowers's Adm'x. v The State use of Dryden*, 32

FIERI FACIAS.

1. Upon the return of a *nulla bona* on a *fieri facias*, issued in the county in which a judgment has been rendered, the clerk of the court of that county may issue a *fieri facias* against the goods, &c. of the defendant, in any other county, &c. *Harden & Carson v Moores, Garn, of Presbury*, 4
2. Whether or not a *fieri facias* issued from one county court to another, should *recite* that a previous *fieri facias* had issued and been returned *nulla bona? Quere*. *Ib.*
3. A *fieri facias* properly issued from one county court to another, may be renewed out of the county court to which it is returned. *Ib.*
4. Where real and personal property were taken under a writ of *fieri facias*, and the sheriff returned the writ "laid as per schedule, and the goods and chattels replevied," and the replevin was by a third party—On motion a writ of *venditioni exponas* was ordered to be issued to the sheriff for the sale of the personal as well as the real estate taken in execution. *Cromwell, et al. v Owings*, 55
5. Goods taken under an execution cannot be replevied out of the officer's hands, either by a stranger, or by the defendant in the judgment; and this whether such goods, when taken, were in the possession of the defendant or not. In either case they are considered as in *custodia legis*. *Ib.*
6. After goods are sold under an execution, and are in the hands of the purchaser, they may be replevied by the true owner; and an action for damages maintained by him against the officer. *Ib.*
7. At common law it is a contempt of the court issuing an execution, to replevy property taken under it. *Ib.*

See Execution.

FORBEARANCE.

See Assumpsit 11.
—— Limitation of Actions 4, 5.

FORMER RECOVERY.

See Ejectment 2.

FRAUD.

1. It is essential that fraud should be alleged in a bill in chancery as the ground and object of admitting parol proof. *Wesley v Thomas*, 6 *Harr. & Johns.* 24

FRAUDS, (STATUTE OF)

See Statute of Frauds.

FREEDOM.

See Widow 2.

G.

GENERAL DEMURRER.

See Demurrer.

GIFT.

1. The act of 1763, *ch.* 13, requiring deeds of gift of slaves to be recorded only where the donor retains possession, a copy of such a deed, the original of which had been recorded, where the possession passed out of the donor at its execution, is not admissible in evidence. *Coale v Harrington*, 147
2. A deed of gift of personal property from a father, (who was not indebted at the time) to his child, executed, acknowledged and recorded, according to law, conveying the property to the child, with a provision that the donor was to remain in its possession and use during life—*Held*, to be valid both at common law and under the statute 13 *Elizabeth*. *Bohn v Headley*, 257
3. —— Such a deed is not within the statute 27 *Elizabeth*, that statute not relating to conveyances of personal, but of real property. *Ib.*

GRANT.

1. The beginning of a tract of land called C. was described in the grant to be "at a bounded red oak, standing 19 perches to the S of the main road, *and at the end of the first line of a tract of land called M*"—*Held*, that the call to begin the tract *C*, at the end of the first line of the tract *M*, was not an imperative one; and that

the jury were not bound to find the tree called for to be at the end of that line, but might find it to be elsewhere, according to the proof. *Rogers, et al. v Moore*, 141
See Court of Chancery 1.

GUARANTY.
1. The defendant signed, and addressed to the plaintiff the following note: "Agreeable to promise I was to call on you this evening, but being too unwell I must beg to be excused; yet as the meeting was to be for the purpose of guaranteeing unto you a debt due you by my brother-in-law, J G, amounting to, &c. I hereby guarantee the said sum."—*Held*, that the consideration did not sufficiently appear on the face of the instrument of writing, as required by the statute of frauds, 29 *Car.* II, *ch.* 3, *s.* 4; and that it was *nudum pactum*, and void. *Elliott v Giese*, 457
2. An undertaking to answer for the debt of another, and though, being in writing and signed by the defendant, yet in the absence of any superadded consideration moving between the plaintiff and defendant, either of forbearance or otherwise, it is *nudum pactum*, and void. *Ib.*

GUARDIAN.
1. A *feme sole*, of the age of 16 years, passed her receipt to her guardian for the amount of her personal estate, without having received it, but in consideration of her guardian's single bill, payable at a future day, for the amount of her personal estate—*Held*, that the guardian's bond was still liable, and that an action might be maintained upon it to recover the value of said estate. *Bowers's Adm'x v The State use of Dryden*, 32

H.

HANDWRITING.
See Evidence 3, 5, 6, 26.

HEARSAY EVIDENCE.
See Declarations.

HEIR.
1. R. having two sons, A and O, and several other children, died in 1768, having by his will devised a tract of land to his youngest son O for life, and died in 1785 leaving two sons, T and J. T in 1790 married and had several children—his eldest son F. O, the tenant for life, died in 1817 intestate, leaving children now living—In an action of ejectment for the land on the demise of F—*Held*, that the plaintiff was entitled to recover. *Bevans v Taylor, et al. Lessee*, 1
See Devise 7.
—— Devisee 1, 2.
—— Executors & Administrators 8, 9.

HUSBAND & WIFE.
1. Where land had been purchased and conveyed in trust for a husband and his wife during their joint lives, and the life of the survivor of them, and the crops growing on the land at the death of the husband were sowed or planted by the vendor of the land before he conveyed it, such crops, as emblements, survived to the wife under the trust deed, and made no part of the husband's personal estate. But if the land had been sowed or planted by the husband after his purchase, it had been otherwise. *Haslett's Adm'r. D. B. N. v Glenn*, 14
2. After the execution of a deed of gift of certain slaves, by a father to his daughter, who was then a single woman, with a provision that the donor was to remain in possession and use during his life, the daughter married. Her father, the donor, died during her coverture, and afterwards her husband died, without having taken any steps to recover the possession of the slaves—*Held*, that the right to them survived to the wife. *Bohn v Headley*, 257
3. Real estate was, after marriage, conveyed in trust for the separate use of the wife, with power to her, among other things, to sell and convey, and absolutely dispose of the same by deed, her coverture notwithstanding—*Held*, that it was competent for her, during the coverture, to charge such estate with the payment of her debts, and that equity would enforce such a contract by decreeing a sale of the estate. *Price & Nisbet v Bigham's Ex'rs.* 296
4. —— *Held* also, that the general power granted to her of disposing absolutely of the estate, included

the power to incumber it by mortgage, or to charge it by contract. *Ib.*

See Pleading 2.

I. J.

IMMATERIAL ISSUE.
See Pleading 2.

ILLEGITIMATE ISSUE.
See Descents 1.

IMMATERIAL ISSUE.
See Pleading 4,

IMPLIED ASSUMPSIT.
See Assumpsit 4.
—— Evidence 18.

INCOMPETENT WITNESS.
See Witness 4, 5, 6.

INFANT.
See Interest 1.

INJUNCTION.
See Court of Chancery 27, 32, 33.

INSURANCE.

1. On a marine policy of insurance against particular risks, the underwriter is supposed tacitly to assent to all reasonable efforts which the master may find it necessary to make for the safety of the property insured, and its transportation to the port of destination, and to authorise him to avoid urgent danger, whether such danger be from a peril insured against or not. *L. & J Riggin v Patapsco Insurance Company,* 279
2. There is no distinction between cases of physical and moral necessity as justifications for departure from the course of the voyage. *Ib.*
3. In every contract of marine insurance it is the obligation of the assured to provide a master of competent skill and prudence; and if in a change of the course of the voyage a loss happen, which may be justly attributed to the master's not being of that character, the insurance is discharged. *Ib.*
4. The apprehension of danger, not founded upon reasonable evidence, does not justify a deviation. The peril apprehended must be such as, if encountered, loss or serious injury is the necessary consequence; the danger must be imminent and obvious, not problematical or contingent. *Ib.*
5. In an action of *covenant* on a policy of insurance against the usual risks, on a vessel "from *Baltimore* to *St. Barts,* and at and from thence to *St. Martha* on the *Spanish Main,* with the privilege of returning to *St. Barts,* or using three other ports on the *Maine,* or in the *West Indies,*" dated the 5th of May 1821—it appeared that the vessel sailed the 5th of May 1821, and arrived at *St. Barts* the 28th, where the captain and supercargo were informed that *St. Martha,* which at the time the vessel left *Baltimore* was in the possession of the *Patriots,* had fallen into the hands of the *Royalist Spaniards*; and having learned that the same port on a former occasion, having been in the possession of the *Patriots,* had fallen into that of the *Royalists,* who had, by keeping the *Patriot* flag flying, decoyed vessels into port and confiscated them; and learning also at *St. Barts,* that *Marguarita,* a *West India Island,* was the best place to acquire information as to the situation of *St. Martha,* the captain proceeded there. On getting there, learning that *St. Martha* was still in the possession of the *Patriots,* the vessel proceeded, without loss of time, to that place, and in the direct course of the voyage there, was lost by the perils of the sea. *Marguarita* was not in the usual tract of a voyage from *St. Barts* to *St. Martha*—*Held,* that the going to *Marguarita* was a deviation which discharged the underwriters. That the danger apprehended by the captain of condemnation at *St. Martha,* was not so *obvious* or *imminent,* as to excuse the departure. That as it was not alleged, that on the occasion when condemnations were proved to have been made at that port before, *American* or neutral vessels had been condemned, such acts of outrage could not be imputed to the agents of a civilized nation. *Ib.*
6. —— *Held* also, that as there appeared to have been another port in the direct voyage from *St. Barts* to *St. Martha,* at which the captain might have obtained the information as to the condition of *St. Martha,* it was his duty to have known that fact, and to have gone

to such port for information if the danger of condemnation at *St. Martha* had been obvious and imminent. *Ib.*

7. Where the facts are admitted, the question of deviation is one of law. *Ib.*

8. In an action of *assumpsit* by C, claiming to be the owner of the property insured, against D, to recover the amount received by D, upon certain policies of insurance effected in his name, *for account of whom they might concern—Held,* that it was competent for D to show that the policies were effected by him as agent of a third person; and that the letters of that person to D, directing the insurances, were admissible evidence of that fact. *Newson's Adm'r. v Douglass,* 417

9. The words "whom it may concern," in a policy of insurance, are technical, and are understood to mean, not any and every body who may chance to have an interest in the thing insured, but such person only as is in the contemplation of the contract. They suppose an agency, and look solely to the principal in whose behalf, or on whose account the agent acts. Such principal is the person in the contemplation of the contract, and is the one whom it alone concerns; and his existence may be proved by extrinsic evidence. *Ib.*

10. No person can avail himself of a policy of insurance, not containing the general clause "whom it may concern," or one of similar import, but those named in the policy as the parties insured, or on whose account it is expressed to be made. But a policy in the name of one, with this general clause, will cover the interest of any person for whose benefit it is intended when effected, and who either previously authorises it, or subsequently adopts it—subsequent adoption in such a case being equivalent to a prior order for the insurance. *Ib.*

11. Where A authorises B to effect an insurance for him—or B, without authority, designs to insure for A, and in either case B directs a sub-agent to insure in such sub-agent's name, with the general clause, the policy will enure to A's benefit, although his interest was known to the sub-agent, or to the underwriters, in like manner as it would have done had it been immediately effected by B himself. *Ib.*

12. —— The plaintiff C, claiming title to the property insured, under a bill of sale to him from the principal of the defendant D—*Held,* that it was not competent for D to show that such bill of sale was intended by his principal to defraud his creditors, however unfair C's conduct may have been in relation to it. *Ib.*

13. The sworn certificate of the captain of a vessel, insured by an agent, of the disbursements of the agent upon the vessel, is not evidence of such disbursements, in an action against the agent by the principal, to recover the amount received of the agent upon the insurance; but the captain himself should be produced. *Ib.*

INTENTION.

See Devise 5.
—— Insurance 9, 10, 11.

INTEREST.

1. In an action on a testamentary bond, brought at the instance of the only daughter of the deceased, to recover her portion of the personal estate of her deceased father, after payment of debts, &c. And it was admitted that no guardian was appointed for her during her minority—*Held* by the county court, that she was not entitled to interest on the sum claimed by her except from the time of her arrival at the age of 16 years. *Handy v The State, use of Townsend,* 42

2. Interest is recoverable as of right upon contracts in writing to pay money upon a certain day—as upon bills of exchange or promissory notes, or on contracts for the payment of interest, or where the money claimed has been actually used, and upon bonds, &c But in other cases it is a question entirely for the jury, to be decided according to the equity and justice between the parties, on a consideration of all the circumstances of the particular case as disclosed at the trial. *Newson's Adm'r. v Douglass,* 417

See Court of Chancery, 19, 20, 21, 22, 26.

INTERESTED WITNESS.

See Witness.

JOINT ACTION.

1. Separate actions cannot be maintained on a *joint* promissory note made by two, although since the act of 1811, *ch.* 161. *Pike v Dashiell's Adm'r.* 466

JOINT & SEVERAL.

See Joint Action 1.

ISSUE.

1. The issue of slaves born during the existence of a tenancy for life, belong to the tenant for life. Per *Archer*, J. *Bohn v Headley,* 257

See Illegitimate Issue.

ISSUES.

1. When there are issues in law and in fact, and it appears by the judgment on the former that the plaintiff has no cause of action, it is not necessary that the latter should be tried by the jury. *The State, use of Levy Court, &c. v Merryman,* 79

Howard v Ramsay, 113

See Immaterial Issue.

JUDGMENT.

See Ejectment 1.

—— Executors & Administrators 4, 5, 7.

—— Law & Facts 3.

JURISDICTION.

1. If the plaintiff shows himself entitled to recover any sum of money, which with interest thereon amounts to a sum within the jurisdiction of the court, it is error for the inferior court to direct the jury generally that he is not entitled to recover. *Barger, et ux. Ex'x. of Athey v Collins,* 213

JURY.

See Grant 1.

—— Law & Facts.

L.

LANDLORD & TENANT.

See Assignee & Assignor 1.

— Rent.

—— Use & Occupation.

LAW & FACTS.

1. It is the province of the court to determine all questions of law arising before them; and of the jury to find all matters of fact, when evidence legally sufficient for that purpose is submitted to their consideration; but this legal sufficiency is a question of law, of which the court are the exclusive judges. *Davis v Davis, et al.* 36

2. Whenever testimony is so slight and inconclusive that no rational mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to instruct the jury, that there is no evidence before them to warrant their finding the fact so attempted to be proved. *Davis v Davis, et al.* 36

L. & I. Riggin v Patapsco Insurance Company, 279

3. When there are issues in law and in fact, and it appears by the judgment on the former that the plaintiff has no cause of action, it is not necessary that the latter should be tried by the jury. *The State use of Levy Court &c. v Merryman,* 79

Howard v Ramsay, 113

4. Where the facts are admitted, the question of deviation is one of law. *L. & I. Riggin v Patapsco Insurance Company,* 279

5. In cases of the sale of goods, &c. the liability of the parties obtaining them depends upon the question—to whom was the credit given? And that is a question of fact for the decision of the jury; though there are cases under the statute, in which the liability of the party undertaken for, is a question of law. *Elder v Warfield,* 391

Wyman v Gray, 409

See Interest 2.

LEGACY & LEGATEE.

1. The value of a legacy, payable one year after the death of the testator's wife, is to be estimated by analogy to the rule adopted in the court of chancery of this state, for ascertaining a widow's allowance in lieu of dower in land sold under a decree of that court, and not by a reference to Dr. *Halley's* table of observations. *Dorsey v Smith,* 345

See Court of Chancery 14.

LEVY COURTS.

1. By the acts of 1794, *ch.* 53, and 1798, *ch.* 34, the justices of the

levy courts of the several counties are authorised and required, on some day between the 1st of March and 1st of October annually, to meet to adjust the ordinary expenses of their several counties, and to impose an assessment sufficient to defray such charges, and to appoint a collector of the same—*Held*, that the power vested in the levy courts to impose taxes is a specially delegated power, and like other specially delegated powers, must be strictly pursued; and that such court had no authority, although it met between the 1st of March and the 1st of October, to adjourn to any day beyond the 1st of October, for the purpose of completing the levy; and any tax imposed at such adjourned meeting, was without authority, and illegal; and although such tax was collected by the collector appointed for the purpose, yet an action on his bond could not be sustained for the amount so collected. *The State use of Levy Court, &c. v. Merryman,* 79

LIMITATION OF ACTIONS.

1. When the statute of limitations once begins to run, no subsequent circumstance stops its operation. It does not however begin to operate unless there is a person *in esse* competent to sue at the time the cause of action accrues. *Ruff's Adm'r. D. B. N. v Bull,* 14
2. A note payable on demand, is payable at and from its date. *Ib*
3. The act of limitations is no bar in an action of trover, where the conversion of the property of the deceased person was before letters of administration were granted to the plaintiff, but at a time when there was no person to assert the right of the creditors and legatees of the deceased. The statute begins to operate only from the time a right to demand the property vests in some one *Haslett's Adm'r. D. B. N. v Glenn,* 14
4. Action of *assumpsit* in consideration of forbearance to sue a bond dated in 1793, payable in 1798, whereby the bond became barred by the act of limitations. The writ was issued in 1817, and the defendant pleaded the act of limitations. The evidence was that in 1815 the agent of the plaintiff applied to the defendant, with the bond, to get him to settle it, either by paying the money, or renewing the bond, and the defendant promised that he would pay the money, and hoped for further indulgence; that he had made payments for which he had not been credited, and that he would call on the plaintiff and renew the bond. There were sundry payments endorsed on the bond, the last in 1815. The original bond was lost, and a copy of it, with the endorsements, was proved. Also an order drawn by the plaintiff on the defendant in 1814, which was paid by him—*Held*, that the evidence was sufficient to support the action. That it could be supported, although the jury might not believe that the agent of the plaintiff was authorised to forbear to sue the defendant, and that he did forbear to sue, and that in consequence thereof, the defendant promised to pay him; and although the promise of payment made by the defendant to the agent, was in consequence of the plaintiff's previous indulgence. *Veasey's Adm'r. D B N. v Bassett's Adm'rs.* 461
5. —— The court refused to direct the jury, that the plaintiff must satisfy them by evidence of the correct balance due from the defendant to him, and that the evidence of the promise in 1815, and the other evidence, were not sufficient to ascertain the balance. *Ib.*

LIMITATION OF ESTATE.
See Devise 3, 4.

LOCATION OF LANDS.
See Grant 1.

M.

MANUMISSION.
See Widow 2.

MINORS.
See Interest 1.

MISTAKE.
See Bail 1, 2.

MONEY HAD & RECEIVED.
See Promissory Note 5.
—— Variance 1.

MORTGAGE.

1. On a bill for a decree for the sale of mortgaged property for payment of the mortgaged debt,

where the mortgage had not been recorded—*Held* by *Johnson*, Chancellor, that in the distribution of the proceeds of sale (which had been made under a decree) the mortgagee was entitled to a preference over the prior creditors, but not so entitled as to the subsequent creditors of the mortgagor, who became such after the date of the mortgage; and that the mortgagee was entitled to the benefit of the prior debts so as to reduce the proportion of subsequent creditors to what it would have been if the previous debts had been fully allowed. *Pannell & Smith v Farmers' Bank of Maryland, et al.* 202

2. In a deed of mortgage of certain property by A to N, to indemnify N against any liability for his endorsements of sundry promissory notes to be drawn by S, it is recited, that "whereas S, the son of A, is about to obtain a loan of $10,000 from the *Union Bank*, on notes drawn by S, payable 60 days after date to N, and endorsed by the said N, which said notes are to be *renewed* from time to time as they become due. And whereas the said A hath agreed to secure the payment of the said notes, and to indemnify the said N for the endorsement of the said notes, or any of them." The deed then conveys the property in fee, subject to the following proviso: "that if the said A and S, or either of them, their heirs," &c. "shall at all times save harmless and indemnify the said N by reason of *any endorsement* made by him of the notes of the said S not exceeding $10,000," then the conveyance was to be void—*Held*, that the recital in the mortgage did not confine its operations to negotiations at the *Union Bank*—the mortgage being sufficiently comprehensive to indemnify N to the extent of $10,000, no matter *where* the notes were discounted. *Chase, et al.* v *M'Donald & Ridgely*, 173

See Court of Chancery 2, 3, 4, 5, 6, 7, 9, 10.
—— Covenant 1.
—— Husband & Wife 4.
—— Promissory Note 6, 9.
—— Tacking.

MUTILATION.
See Evidence 6, 8.

N.

NOTICE.
See Bank Checks 1, 2.
—— Promissory Note 10, 11, 12, 13.

NUDUM PACTUM.
See Devisee 1, 2.
—— Guaranty.

O.

OATH.
See Collector 1.

OBLITERATION.
See Evidence 6, 8.
—— Will 5, 6, 7.

OFFICE COPY.
See Copy.

OFFICE & OFFICER.
See Collector 1.

OFFICIAL ACTS.
See Collector 1.

OR.
See And & Or.
—— Devise 5.

ORDER.
See Parol Evidence 1, 2.

ORPHANS COURT.
See Executors & Administrators 3, 8.
—— Evidence 1.

P.

PARENT & CHILD.
See Gift 2, 3.

PAROL AGREEMENT & CONTRACT.
See Court of Chancery 1.

PAROL EVIDENCE.
1. A bill of sale of all the personal estate of the grantor passes whatever personal estate then belonged to him; and parol evidence is admissible to show of what species of property that personal estate consisted. *Coale v Harrington*, 147
2. Although it was clear from the evidence, that an order of the *Intendant* of *Havana*, under which certain additional duties were paid, was in writing, still its contents might be proved by parol, and it was not necessary to prove it by an authentic or sworn copy—the

rule which requires this last proof, being applicable only to such foreign laws, or public edicts, of which a regular record is necessarily presumed to have been kept. *Drake v Hudson & Franciscus*, 399

3. —— Even although the contents of such order could not legally be proved by parol; yet payments made under it might be so proved, as such payments established the fact of the amount of the duties payable at *Havana*, and the usage to pay them; and a usage or custom may be proved by parol, whether it originates in a public written law or not. *Ib.*

4. To support an agreement under the statute of frauds, a good consideration must not only exist, but it must appear in the agreement itself, and cannot be supplied by parol evidence. *Wyman v Gray*, 409

5. Parol evidence is admissible to prove a want or a failure of consideration for which a promissory note was given; and the holder of the note stands in the place of the payee, and is subject to all the equity of the maker. *Ib.*

6. No parol evidence can be given of a judgment and execution, unless a proper foundation is first laid for its introduction. *Giese v Thomas*, 458

See Insurance 9, 10, 12.

PARTNERS & PARTNERSHIP.

1. Where there are joint traders, and one of them draws a note, gives a letter of credit or guarantee in the name of all the partners, it binds all. *Coursey v Baker*, 28

2. —— The act of each partner, in a transaction relating to the partnership, binds all the partners; and to this rule there is no exception, except what may grow out of covin, or such gross negligence as may be equivalent to covin. *Ib.*

3. A promissory note given by one of two joint partners to W B, for a debt due from the partners to W B and W C, also partners in trade, may be sued on in the name of W B, and his recovery is as trustee for W B and W C, and enures to their benefit. *Ib.*

4. Where a debt is due to a partnership which is afterwards dissolved, and the debt is assigned to one of the partners, it is competent for such partner to sustain an action of *assumpsit* for it in his own name by proving that the debtor, with a knowledge of such assignment, promised to pay it to him; and such promise may be implied from the acts of the debtor, as well as expressly proved. *Barger, et ux. Ex'x. of Athey v Collins*, 213

See Assumpsit 3.

PATENT.

See Grant.

PAYMENT.

See Consignee & Consignor 1, 2.
—— Parol Evidence 2.

PLEADING.

1. In giving judgment on a demurrer to a plea, &c. the court go to the first error. *The State, use of Levy Court, &c. v Merryman*, 79

2. Replevin for goods and chattels taken in the house of the plaintiff the 26th of February 1822. The defendant avowed the taking, &c. because one J for two years ending the 22d of August 1821, and from thence until, &c. held and enjoyed the said house, as a sub-tenant thereof, to one W, he being the assignee of one S, of a lease before then assigned to S by one N, the lessee in a demise made by the defendant and G, her then husband, to N, on the 22d of August 1801 for 99 years, &c. under a rent of $100, payable on the 22d of August annually. And because $200 of the said rent, for two years ending the 22d of August, 1821, were due and in arrear under the said demise by the defendant and her husband, who, seized of the premises only in right of the defendant, died the 25th of November 1819, the defendant avowed the taking the said goods and chattels as for distress for the said rent so due to her. To this avowry the plaintiff pleaded three pleas—1. That the defendant did not demise the house, &c. in manner and form as is in the avowry alleged. 2. That the said J did not hold and enjoy the house as tenant thereof to the defendant, under the supposed demise thereof in the avowry mentioned, in manner and form, &c. 3. That there was no rent in arrear, &c. To the first two pleas the defendant demurred, and took issue on the

third—*Held*, first, that the first plea was bad in substance, because the demise stated in the avowry was a joint demise by the defendant and her husband, and the plea traversed a demise by the defendant only, which was the tender of an immaterial issue that would not be cured by verdict.—*Held*, secondly, that the second plea was good, because the demise it referred to and traversed, was the joint demise by the defendant and her husband, stated in the avowry, and by the avowry J was sufficiently, though indirectly, asserted to be the tenant whose goods were subject to the distress; and that if by the avowry it appeared that J was in no degree, and for no purpose, the tenant of the avowant, the avowry itself would be bad——*Held*, thirdly, that as the second plea, which was ruled good on the demurrer, went to the whole cause of action of the avowant, it was not necessary to try the issue in fact joined on the third plea. *Howard* v *Ramsay*, 113

3. In an action of debt on a single bill, the defendant pleaded general performance of *articles of agreement*, and the plaintiff replied by a *protestation*, that the defendant had not performed the articles of agreement, and issue was joined—*Held*, that the pleadings were irregular; that in fact there was no issue joined in the cause. That to make an issue, as the plea affirmed the performance of articles of agreement, there should have been in the replication an express negation of the plea. That a denial, by way of protestation, is no denial, and is ever unavailable in the suit in which it is made, and in that suit the matters protested against are in effect admitted. *Martin v Garrett*, 272

4. —— *Held* also, that if there was an issue joined in fact, it was an immaterial one, as it was joined on articles of agreement which did not appear in the pleadings, the action being on a single bill, and was, therefore, an issue on a point different from the material allegation in the plaintiff's declaration. *Ib.*

5. —— A verdict having been given for the defendant, and judgment rendered thereon, it was, on appeal, reversed, and a *procedendo* ordered, that the court below might award a *repleader*. *Ib.*

6. In an action of *debt* on bond with a collateral condition, breaches must be assigned; but where there was an agreement that the defendant plead *nil debet*, and that he should, on the issue to that plea, give in evidence all matters which he could give under any form of pleading which could be legally used—*Held*, that although it was a loose mode of proceeding it would be sanctioned; and that the true meaning of the agreement was to waive *on both sides* all errors in the pleadings, and to dispense with the necessity of the plaintiff's assigning breaches. *Laurenson v The State use of Levy Court, &c.* 339

7. A general demurrer to a plea confesses all the facts which are well pleaded. *Neale* v *Clautice*, 372

8. A plea in trespass is bad on demurrer that does not cover the whole trespass laid in the declaration, although it need not answer matter stated in aggravation of damages. *Ib.*

9. In an action of trespass for taking personal chattels, the declaration must state them to be the plaintiff's at the time of the taking, or the omission will be fatal even after verdict. *Ib.*

10. —— Where the declaration contained an averment of property in the plaintiff at the time of the taking, a plea, justifying the taking, as a distress for rent due, the defendant by a third person, and that the chattels were on the demised premises when the rent accrued, and were fraudulently removed, and afterwards pursued and taken within thirty days, is insufficient; because it does not deny that they were, at the time of the taking, the property of the plaintiff. If such a plea averred them to belong to the tenant when taken, the plea would seem to be good, except as to form. *Ib.*

11. —— A plea, that the property in the chattels was in the defendant, or in a third person, would be bad on special demurrer; because it would amount to the general issue. *Ib.*

12. The general replication *de injuria sua propria*, &c. is only proper where matter of excuse is pleaded by the defendant, and not where he relies upon title. *Ib.*

13. Where the judgment of an inferior court against the plaintiff on demurrer to the pleadings, was reversed, a *procedendo* was awarded. *Ib.*
See Assignee & Assignor 1.
—— Court of Chancery 8.
—— Law & Facts 3.
—— Rent 3, 4, 6, 7, 8.

POWER.
See Husband & Wife 3, 4.

PRACTICE.
1. It is not the practice in this state to require a warrant of attorney to authorise the appearance of a defendant by attorney, and the *English* rules of practice upon that subject are not applicable here. *Henck v Todhunter, et al.* 275
2. A party may here appear in *propria persona*, or by attorney, and when the appearance of an attorney is entered on record, it is considered as done by the authority of the party; and whatever is done in the progress of the action in which such appearance is entered, is esteemed as done by and as binding on him. Whether the attorney is or is not faithful to his trust, is a matter between him and the party. *Ib.*
3. Where, therefore, an attorney on the record applies for permission to have his appearance stricken out, the presumption is that he does it by the authority of his client; and the client is not thereby entitled to a continuance of the cause, but it is to be proceeded in as if the appearance had not been stricken out. *Ib.*
4. Where the inferior court had permitted a plea to be stricken out, and it was ruled that the defendant answer anew, and then, at the instance of the defendant's counsel, the appearance of the counsel was stricken out, and no new plea was put in—*Held*, on appeal, by the appellate court, that a judgment by default was properly entered against the defendant, as it was to be presumed that the leave to withdraw the plea was on condition that the defendant should plead anew, without delay, and that the rule then laid on him to plead anew, was virtually, a rule to plead *instanter*. *Ib.*
5. Courts will sometimes enlarge or suspend their rules when the ends of justice require it. *Carroll, bail of Bradford v Barber,* 454
See Bail.
—— Procedendo.

PREEMPTION.
See Court of Chancery 1.

PREFERENCE.
See Court of Chancery 10.
—— Mortgage 1.

PRESUMPTION.
See Collector 1.
——Court of Chancery 1.

PRIMA FACIE EVIDENCE.
See Executors & Administrators 8.

PRINCIPAL & AGENT.
1. C was employed by W principal keeper in the *Maryland Penitentiary*, (and who, as such, had authority to employ deputies,) to act as deputy keeper at a certain annual compensation. The compensation of all the officers of the institution was by law to be drawn from the treasury of the state. C's compensation was received from the treasury by W, who was afterwards dismissed from the institution. In an action of *assumpsit* by C against W, to recover the money so received by him—*Held*, that C was entitled to recover; and that it was immaterial in what manner C was employed by W, whether it was in W's public or individual capacity, and that it was also immaterial, whether he had paid over the compensation to the directors of the institution, or not, as they had no authority to receive it, and his responsibility to C was in virtue of his receipt of the fund.—*Chapman v Williams,* 157
2. An agent may so contract as to bind himself personally. As where the payees of a note signed by an agent, knew that he was the agent of an incorporated company at the time the payees sold to them certain merchandize, and refused to give them credit for it; but elected to deliver it on the individual credit of the agent, and the agent had, under such circumstances, agreed to bind himself personally, it would be an agreement for a sufficient consideration. *Wyman v Gray,* 409
See Declarations 1.
—— Insurance 8, 9, 10, 11, 12, 13.

PRINCIPAL & SURETY.

1. K was appointed a collector of taxes under the act of 1794, *ch.* 53, and gave bond, with sureties, as such, and proceeded to collect. In an action of *debt* on the bond against one of the sureties therein, to recover such collections—*Held*, that it was not competent for such surety to defend himself upon the ground that K had not taken the oath prescribed by law. That as K was regularly appointed collector, and bonded and acted as such, he was to be presumed to have complied with all other necessary qualifications; that in an action against him he could not defend himself upon the ground of his own neglect, and that his sureties, in relation to such a defence, were in point of law, in the same situation. *Laurenson v The State use of The Levy Court, &c.* 339

PRIORITY.

See Preference.

PRIVITY.

See Covenant 2.
— Rent 1.

PROCEDENDO.

1. The court below having quashed a writ of *scire facias* issued against bail, on appeal, the judgment was reversed, and on motion, a *procedendo* was awarded. *Boyle v Robinson, Bail of Coulter & Fisher,* 200
2. Where the judgment of an inferior court against the plaintiff on demurrer to the pleadings, was reversed, a *procedendo* was awarded. *Neale v Clautice,* 372
3. A verdict having been given for the defendant, on an immaterial issue, and judgment rendered thereon, it was on appeal reversed; and a *procedendo* ordered, that the court below might award a repleader. *Martin v Garrett,* 272

PROMISE.

See Collateral Promise.

PROMISSORY NOTE.

1. A promissory note payable on demand, is payable on the day of its date. *Ruff's Adm'r. D. B. N. v Bull,* 14
2. A promissory note drawn by A, in favour of B, endorsed by B to C & D, *executors of T.* and by C, *one of the executors,* endorsed to the plaintiff. C died, and an action of *assumpsit* was brought on the note against D, in which he was styled in the writ and declaration *executor of T,* and his liability and undertaking were alleged to be in that character, and he confessed judgment, and the entry of the judgment stated it to be against him *as executor.* On appeal—*Held,* that such judgment was, notwithstanding, a judgment *de bonis propriis. Curtis's Ex'x. v. Bank of Somerset,* 25
3. Where there are joint traders, and one of them draws a note, gives a letter of credit or guarantee in the name of all the partners, it binds all. *Coursey v Baker,* 28
4. A promissory note given by one of two joint partners to W B, for a debt due from the partners to W B and W C, also partners in trade, may be sued on in the name of W B, and his recovery is as trustee for W B and W C, and enures to their benefit. *Ib.*
5. Where there was a variance between the date of a promissory note declared upon, and that offered in evidence—*Held,* that as there was a count in the declaration for money had and received, the note was, under that count, properly given in evidence. *Ib.*
6. The execution of a mortgage, by an accommodation endorser of a promissory note, to the holder, to secure the payment of the note, does not extinguish the note in relation to any of the parties to it. *Clopper's Adm'r. v The Union Bank of Maryland,* 92
7. Where a promissory note was drawn by C, in favour of P, and by him endorsed to the holder, and P, after the note fell due, gave the holder his own note for the debt—*Held,* that the first note was not extinguished, unless the last was received by the holder, in substitution and in satisfaction of the first *Ib.*
8. Giving time to the endorser of a promissory note, drawn and negotiated, with the knowledge of the holder, for the accommodation of the endorser, will not discharge the maker. In relation to the effect of giving time in cases of notes and bills of exchange, there is no distinction between real and accommodation paper. *Ib.*

9. A covenant not to sue generally, without any limitation as to time, is in law a release, and may be pleaded as such; but a covenant not to sue for a limited period, cannot be pleaded in suspension of a creditor's action; and if he sues, the debtor's remedy is an action upon the covenant. But this latter doctrine does not extend to actions of *assumpsit;* and therefore, where the holder of a promissory note, in consideration that the accommodated endorser would give him a mortgage to secure its payment, stipulated that he would not, for a definite period, sue the maker, and suit was brought against the maker before that period had passed, it was held that it could not be maintained, though the maker was no party to such stipulation. *Ib.* 103

10. Where a promissory note is drawn for the accommodation of the endorser, he is not entitled to notice of nonpayment. *Ib.* 102

11. Courts will inquire into the liabilities of the respective parties to a promissory note or bill of exchange, for the purpose of ascertaining whether any injury, either actual or presumptive, could take place by the omission to give notice of nonacceptance or nonpayment. *Ib.* 102

12. Notice of nonacceptance of a bill of exchange, is not necessary where the drawer, at the time when presentment should be made, has no effects in hands of the drawee, or having such effects, withdraws them before presentment is made, and has no reasonable grounds to expect his bill will be honoured — *Eichelberger v Finley & Van Lear,* 381

13. —— In relation to notice in such a case, there is no distinction between a refusal to accept, and a refusal to pay—the same principles apply to both. *Ib.*

14. In an action of *assumpsit* by W, as the endorsee of a promissory note, against G, the maker, it appeared that G was the president of an incorporated manufacturing company; that the payees of the note sold merchandize to the company, and sent it, with a bill of parcels, to the company, in which they charged them as their debtors, and that G afterwards sent the payees the note sued upon, for the amount, signed by him, with the addition to his signature of the words "*Presid.*" &c. which note was endorsed, after it fell due, to W, the plaintiff—*Held,* that W was not necessarily entitled to recover. That if the payees of the note, in selling to the company, gave credit to them, by which the debt became the debt of the company, and not to G, his note, given in consideration of such debt, was but a promise to pay the debt of another, and void for the want of a sufficient consideration. *Wyman v Gray,* 409

15. —— Whether the credit on the sale of the merchandize was originally given by the payees of the note to the company, or to G individually, and whether the note was passed on account of that transaction or not, were questions of fact for the jury, to be decided upon all the evidence. *Ib.*

16. In an action on a promissory note by the payee, or by the holder to whom it was endorsed after it became due, it is always competent to the defendant to prove, either a want or a failure of consideration—the holder, in such a case, standing in the place of the payee, and being subject to all the equity of the maker; and parol evidence is admissible for this purpose. *Ib.*

16. Separate actions cannot be maintained on a *joint* promissory note made by two, although since the act of 1811, *ch.* 161. *Pike v Dashiell's Adm'r.* 466

See Bank Checks.

PROTESTATION.

See Pleading 3.

PUBLIC AGENT.

See Principal & Agent 1.

PUBLIC EDICT & LAW.

See Parol Evidence 2, 3.

PURCHASE & PURCHASER.

See Court of Chancery 18, 19, 20, 21 22, 23, 24, 25, 27, 28, 29.

Q.

QUESTION OF FACT.

See Law & Facts.

R.

REAL ASSETS.

See Devisee 1, 2.

RECEIPT.

See Feme Sole 1.

RECITAL.

See Contract 1.
—— Mortgage 2.

RELEASE.

See Covenant 1.
—— Promissory Note 6, 7, 9.

RENT.

1. In *covenant* for rent arrear, there must be a perfect privity between the plaintiff and defendant, but such privity is not necessary to make a person's goods liable to a distress for rent as a tenant. A distress is rather a remedy upon the land demised, than against the person of a tenant, although some tenancy must be shown to sustain it. *Howard v Ramsay,* 1[illegible]3
2. To sustain an avowry for rent arrear, the avowant must establish such a relation between him, and the party distrained upon, as may in law constitute the latter in some degree a tenant of the former; and as it appeared that J, who, although avowed to be, was not the tenant of the avowant—*Held,* that the goods of R, a stranger, found on the premises, could not be taken to satisfy the rent due from a man whose goods could not be distrained to pay it. *Ib.*
3. In an action of *assumpsit* against N, to charge her as executrix of C, with rent accruing after C's death, upon a demise from the plaintiff to C, evidence must be given, on the plea of *non assumpsit,* of her being executrix, as well as that she occupied the demised premises. *Stoddert v Newman,* 251
4. In an action against the assignee of a term to recover the rent of the demised premises, general pleading is allowable; but it must be shown, as well as generally alleged, that the defendant is either in fact or in law assignee. *Ib.*
5. A landlord may distrain the goods of his tenant, fraudulently and clandestinely removed off the demised premises to avoid the rent, under the statute 11 *Geo.* II, *ch.* 19, within thirty days from the the time of removal, although the lease, under which the rent was due, may then be determined, and the tenant may not be in possession of the premises. *Dorsey v Hays,* 370
6. —— An avowry, in a case of that kind, which only avers that the goods were fraudulently and clandestinely removed by the tenant, without also avering that they were so removed with a view to avoid the rent, is rendered good, if issue be taken on the fact that they were so removed with that intention; although it might, perhaps, be bad on demurrer. *Ib.*
7. In replevin, where the defendant avows the taking of the goods for rent arrear, the same jury who try the cause, may assess and value the goods distrained, without the avowant's praying that they should do so *Ib.*
8. To support an avowry for rent, it is not necessary that it should be averred, that the avowant's interest in the demised premises continued at the time of the distress. *Ib.*
9. Where goods are fraudulently removed by a tenant to avoid his rent, and afterwards sold by him to a *bona fide* purchaser, the sale is valid under the statute 11 *Geo.* II, *ch.* 19 *Neale v Clautice,* 372
10. Goods of a third person cannot be taken for rent, unless they are found, at the time of the distress, on the premises. *Ib.*

See Pleading 2, 10.
—— Trespass 5.

RENUNCIATION.

See Evidence 6.
—— Widow 1.

REPLEADER.

See Pleading 5.

REPLEVIN.

1. Goods taken under an execution cannot be replevied out of the officer's hands, either by a stranger, or by the defendant in the judgment; and this whether such goods, when taken, were in the possession of the defendant or not. In either case they are considered as in *custodia legis.* *Cromwell, et al. v Owings,* 55
2. After goods are sold under an execution, and are in the hands of the purchaser, they may be replevied by the true owner; and an action for damages maintained by him against the officer. *Ib.*
3. Replevin in this state is the usual remedy to enable an owner to recover personal property from the possession of another, whether that

possession be tortious or not; but to this there is an exception as to such goods as are in the custody of the law, or as have been taken by replevin, from the owner, by the party in possession. *Ib.*

4. At common law it is a contempt of the court issuing an execution, to replevy property taken under it. *Ib.*

See Pleading 2.
—— Rent 7.

REVERSIONER & REMAINDER-MAN.
See Court of Chancery 18, 21, 22.

REVOCATION.
See Will 5, 6, 7.

RIGHT OF ACTION.
See Extinguishment 1, 2.

RIGHT OF WAY.
See Way.

RULES OF COURT.
1. Courts will sometimes enlarge or suspend their rules when the ends of justice require it. *Carroll, Bail of Bradford v Barber,* 454
2. The refusal of an inferior court to extend a legitimate rule of that court, is not a ground of error, and is but an interlocutory proceeding, upon which an appeal will not lie. *Ib.*

See Bail 3, 4.
—— Practice 4.

S.

SCIRE FACIAS.
See Bail 1.

SECURITY.
See Court of Chancery 9.
—— Surety.

SET OFF.
See Evidence 25.
—— Insurance 13.

SETTLEMENT.
See Assumpsit 3.
—— Evidence 16, 17.

SHERIFF.
See Collector 1.
—— Fieri Facias 4, 5, 6.
—— Replevin 1, 2, 3.

SIMPLE CONTRACT CREDITOR.
See Devisee 1, 2.

SLAVES.
See Widow 2.

SPECIAL AUTHORITY.
See Levy Courts 1.

SPECIAL BAIL.
See Bail.

SPECIFIC DISTRIBUTION.
See Widow 2.

SPECIFIC PERFORMANCE.
See Court of Chancery 1.

STATUTE OF FRAUDS.
1. Every collateral undertaking to answer for the debt, &c of another, is, by the statute of frauds, void, if not in writing; but original undertakings are not within the statute, and need not be in writing. *Elder v Warfield,* 391
2. Where there is a preexisting debt, or other liability, a promise by a third person to pay, having immediate respect to, and founded upon, such debt or liability, without any new consideration moving to him, is a collateral undertaking, and is within the statute. *Ib.*
3. —— But where, distinct from the original liability, there is a superadded consideration for the promise, moving between the party making it, and him to whom it is made, the undertaking is an original one, and is not within the statute. *Ib.*
4. Where there is no previous liability, but the promise of one is the inducement to, and ground of, the credit given to another, such promise is also a collateral undertaking, and within the statute. The rule being, that wherever the party undertaken for, is originally liable upon the same contract, the statute applies; but where such party is under no original liability, the promise is an original undertaking, not embraced by the statute, and is good; and his becoming liable afterwards does not alter the rule, though not in writing *Ib.*
5. In cases of the sale of goods, &c. the liability of the parties obtaining them depends upon the question, to whom was the credit given? And that is a question for the decision of the jury; though there are cases, under the statute, in which the liability of the party undertaken for, is a question of law

The debiting the party obtaining the goods, with them in the books of the vendor, is not conclusive evidence that the credit was given to him. *Ib.*

In an action of *assumpsit* by W, as the holder of a promissory note, against G, the maker, it appeared that G was the president of an incorporated manufacturing company; that the payees of the note sold merchandize to the company, and sent it, with a bill of parcels, to the company, in which they charged them as their debtors, and that G afterwards sent the payees the note sued upon, for the amount, signed by him, with the addition to his signature of the words "*Presidt.*" &c. which note was endorsed, after it fell due, to W, the plaintiff—*Held*, that W was not necessarily entitled to recover. That if the payees of the note, in selling to the company, gave credit to them, by which the debt became theirs, and not to G, his note, given in consideration of such debt, was but a promise to pay the debt of another, and void for the want of a sufficient consideration. *Wyman v Gray*, 409

7. —— The statute of frauds which requires an agreement to pay the debt, &c. of another, to be in writing, was not intended to make good agreements, though in writing, which would not be good at common law—a consideration, therefore, is necessary to their validity. *Ib.*

8. —— And to support an agreement of this kind under the statute, a good consideration must not only exist, but it must appear in the agreement itself, and cannot be supplied by parol evidence. *Ib.*

9. —— An agent may so contract as to bind himself personally; and in this case the payees of the note might, with a knowledge that G was the agent of the company, when they sold the merchandise in question, have refused to give them credit for it, and elected to deliver it on the individual credit of G; and if he had, under such circumstances, agreed to bind himself personally, it would have been an agreement for a sufficient consideration. *Ib.*

10. —— If the fact had been that G was a stockholder of the company, his individual agreement to pay a debt of theirs would be void for the want of a consideration; because his liability, as a member, would be a liability only in his corporate capacity, and binding only to the extent of his corporate funds. *Ib.*

11. —— Whether the credit on the sale of the merchandise was originally given by the payees of the note to the company, or to G individually; and whether the note was passed on account of that transaction or not, were questions of fact for the jury, to be decided upon all the evidence. *Ib.*

12. An undertaking to answer for the debt of another, and though being in writing, and signed by the defendant, yet in the absence of any superadded consideration moving between the plaintiff and defendant, either of forbearance or otherwise, it is *nudum pactum*, and void. *Elliott v Giese*, 457

See Court of Chancery 1.
—— Declaration 4.

STOCKHOLDER.

See Statute of Frauds 10.
—— Witness 1.

SUB-AGENT.

See Insurance 11.

SUBSCRIBING WITNESS.

1. When an instrumentary witness resides out of the jurisdiction of the court, so as not to be amenable to its process, or cannot be found after diligent inquiry, the proof of his handwriting is evidence of every thing on the face of the instrument. *Dorsey v Smith*, 345

See Evidence 3, 4, 5, 24.

SUB-TENANT.

See Under Tenant.

SUBSTITUTION.

See Court of Chancery 9.
—— Executors & Administrators 9.
—— Promissory Note 7.

SURETY.

See Court of Chancery 3, 9.
—— Guardian 1.
—— Levy Courts 1.
—— Principal & Surety.

SURVIVOR.

See Husband & Wife 1.

T.

TACKING.
See Court of Chancery 2. 5, 6, 7.

TENANT FOR LIFE & YEARS.
1. The issue of slaves born during the existence of a tenancy for life, belong to the tenant for life. Per *Archer*, J. *Bohn v Headley*, 257
See Heir 1.
—— Pleading 2.
—— Rent 1, 2.

TENDER.
See Court of Chancery 19.

TESTAMENTARY BOND.
See Administration Bond.

TRESPASS.
1. In trespass *quare clausum fregit*, for breaking the plaintiff's close, and erecting thereon a wall, by which the plaintiff was prevented from using the water in her well. The facts were, that the well did not belong to the plaintiff, but to the defendant, and was on the land of the latter, but that the plaintiff had a right to use the water in it—*Held*, that the action could not be sustained, but that the plaintiff's remedy for being deprived of the use of the water was *an action on the case*. *Shafer v Smith*, 67
2. In an action of trespass, the circumstances which accompany and give character to the trespass, may be given in evidence to increase the damages. *Ib.*
3. —— And in an action of trespass to the person of the plaintiff, other trespasses to his person, or to that of his wife, children or servants, if committed at the time of the principal trespass, (being laid in the declaration,) may for like purpose be given in evidence; as may also the defendant's conduct and language at the same time, as proving his malice. But in no case can damages be recovered in one action for an independent substantive injury for which another form of action is prescribed. *Ib.*
4. In an action of trespass for taking personal chattels, the declaration must state them to be the plaintiff's at the time of the taking, or the omission will be fatal even after verdict. *Neale v Clautice*, 372
5. —— Where the declaration contained the averment of property in the plaintiff at the time of taking, a plea, justifying the taking as a distress for rent due to the defendant by a third person, and that the chattels were on the demised premises when the rent accrued, and were fraudulently removed, and afterwards pursued and taken within thirty days, is insufficient, because it does not deny that they were, at the time of the taking, the property of the plaintiff. *Ib.*
See Pleading 8, 9, 10, 11, 12.

TROVER.
1. H, being entitled by deed, at her father's death, to certain slaves, the father sold them as slaves for life to B, who took possession, and used them as his own—*Held*, in an action of trover, brought at the father's death by H against B, for the value of the slaves, that there must be other evidence of a conversion of the slaves by B, to entitle H to recover. *Bohn v Headley*, 257
See Limitation of Actions 3.

TRUST & TRUSTEE.
See Partners & Partnership 3.

U.

UNDER TENANT.
See Pleading 1.
—— Tenant 2.

USAGE.
1. A usage or custom may be proved by parol, whether it originate in a public written law, or not. *Drake v Hudson & Franciscus*, 399

USE & OCCUPATION.
1. To support an action for use and occupation a demise must be shown, or some evidence given, to establish the relation between the parties, of landlord and tenant. *Stoddert v Newman*, 251

V.

VARIANCE.
1. Where there was a variance between the date of a promissory note declared upon, and that offered in evidence—*Held*, that as there was a count in the declaration for money had and received, the note was, under that count, properly given in evidence. *Coursey v Baker*, 28

2. A declaration in trespass for preventing the plaintiff from using the water in *his* well, and the evidence proving the well to belong to the defendant, is a fatal variance. *Shafer v Smith*, 67

3. In debt on an award, there was a variance between the sum awarded, and that declared for. See DECLARATION 2, and *James v Laurence's Adm'r*. 73

VENDOR & VENDEE.
See Court of Chancery 27, 28, 29, 30.
—— Witness 6.

W.

WAIVER.
See Appeal 3.
—— Bill of Exceptions.
—— Pleading 6.
—— Witness 3.

WARRANT OF ATTORNEY.
See Attorney at Law 1.

WAY.
See Court of Chancery 27, 28, 29, 30.

WIDOW.

1. The renunciation by a widow of a bequest or devise to her in her husband's will, must be in writing and signed by her; and a certificate by a register of wills that a widow had appeared before him and renounced a bequest or devise to her, is not admissible in evidence to prove the execution of a renunciation by her. *Handy v The State use of Townsend*, 42

2. A widow is entitled to her third part or share of the *specific property* remaining of her deceased husband's personal estate, after the payment of his debts—As where L by his will manumitted his slaves, leaving other personal property more than sufficient to pay all his debts, which were paid, and his widow had renounced the devises and bequests to her in his will, and claimed her thirds. Distribution of the slaves was made by order of the orphans court between the widow and children of the deceased, and one of the slaves, who was allotted to the widow, petitioned for his freedom—*Held*, that he was not entitled to freedom. *Negro William v Kelly*, 5 *Harr. & Johns.* 59

WILL.

1. In an ejectment where the defendant's title to the land sued for, and his only defence was under a supposed will of a former owner, and it appeared that there had been a former ejectment against the defendant, in which the same question was in issue, and in which the said supposed will was adjudged to be invalid, and the case on that ground decided against him—*Held*, that he was not thereby concluded from going into evidence to establish the legality of the will. *Edelen v Hardey's Lessee*, 61

2. Where it appeared that the will under which the defendant claimed title in ejectment, was signed by the testator, in the presence of the witnesses, but that they, at his request, took it into an adjoining room to attest it, between which and the testator's room there was a plank partition, and after attesting it, it was carried to the testator, and he informed of the attestation, and approved of it—*Held*, that *prima facie*, the will was not legally executed. *Ib.*

3. It is not essential that a testator should actually see the witnesses to his will sign it; but it is essential that he should be in a situation, whence he could do so, if he desired. *Ib.*

4. Land acquired after the execution of a will, does not pass by the will. *Kemp's Ex'x. v M'Pherson, et al.* 320

5. The cancelling of a will by a testator is an equivocal act, and does not amount to a revocation unless it is done *animo revocandi*. *Semmes v Semmes, et al.* 388

6. —— Where it is a dependant relative act, done with reference to another will, which the testator thinks he has legally executed, it may be a revocation or not, as such other will is valid or not—As where a testator, having executed one will, causes another to be prepared, and cancels the first, only because he supposes the second to be duly executed, the cancelling the first, will not operate as a revocation of it, if the second proves to have been improperly executed. But where the cancelling is deliberately done without accident or mistake, it will operate as a revocation, notwithstanding the party may at the time have intended to

make another will, and afterwards omitted to make it. *Ib.*

7. Where the cancelling of a will by drawing a pen by the testator across the signature of his own and the names of the witnesses, was held to be a revocation, although the testator, by a memorandum at the foot of the will, stated that the death of his wife had made it necessary for him to make another will, and no other will was made by him. *Ib.*

WITNESS.

1. Where the corporate name of a bank is "The President," &c. and an action is brought against the bank in its corporate name, the president is only so sued, and is only liable in his corporate capacity, and cannot be considered as a party on the record, so as to let in his declarations in evidence against himself; but he should be produced as a witness by the plaintiff, as he might be so produced, and compelled to testify, although he was also a stockholder, and his evidence affect his interest as a stockholder. *City Bank of Baltimore v Bateman*, 104

2. In *assumpsit* to recover the value of a quantity of hardware sold by P, the plaintiff, to D, the defendant, D offered to prove by W, that he, the witness, and D and P, had with others, associated together to build several houses; that P was to furnish the necessary hardware, and was to be paid by having an interest in one of the houses when finished; and that the hardware in dispute, was delivered by P to D, under this agreement—*Held,* (on the objection of P,) that W was not a competent witness, because he had an interest in defeating the action; for if P recovered, he, W, would not only be liable to contribute a proportion of the verdict, but would also be responsible for a proportion of the costs. *Owings & Piet v Low,* 124

3. Where the court overrule an objection to the competency of a witness, and the party making it is preparing his bill of exceptions, he does not waive the benefit of the exception by examining the witness as to the points in issue, before the bill of exceptions is signed and sealed. *Ib.*

4. In an action of replevin, the former owner of the goods replevied, is not a competent witness for the plaintiff, to prove that he had previously sold them to the plaintiff, and that they had subsequently been sold under an execution upon a judgment of a third person, and purchased at such sale by the defendant; as no parol evidence could be given of such judgment and execution, no foundation being first laid for its introduction. *Geise v Thomas,* 458

5. —— But if the judgment and sale to the defendant had been first properly proved, the former owner would have been a competent witness to prove a previous sale by him, for a valuable consideration, to the plaintiff. *Ib.*

6. A vendor is not generally a competent witness to prove title in his vendee against a stranger, claiming adversely, as he is interested by reason of his implied warranty in supporting the title of the vendee. *Ib.*

WRIT OF ERROR.

See Appeal.

END OF THE SEVENTH VOLUME.

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